UBMITTED

4/24/26

TRANSCRIPT OF RECORD

Dis

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 79

WONG TAI, ALIAS WONG SUE JUN, ALIAS WONG WAI,
PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF CALIFORNIA

FILED APRIL [illegible]

(31,068)

(31.068)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 378

WONG TAI, ALIAS WONG SUE JUN, ALIAS WONG WAI,
PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 27, 1925

[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

No. 15559

UNITED STATES

vs.

WONG TAI, Alias, etc.

PRECIPE FOR TRANSCRIPT OF RECORD—Filed March 25, 1925

To the Clerk of said court:

SIR: Please make certified copy of the following papers and records for purpose of trans.

(1) Indictment.
(2) Demurrer.
(3) Plea.
(4) Order overruling Demurrer & plea.
(5) Mo. for bill of particulars & all papers relating thereto, and order overruling same.
(6) ——.
(7) Trial—all minute orders relating thereto.
(8) Verdict.
(9) Judgment & sentence.
(10) Engrossed bill of exceptions.
(11) Pet. for Writ of Error.
(12) Order allowing same.
(13) Writ of Error.
(14) Citation on Writ.
(15) Assignments of Error.
(16) Cost bond.
(17) Bond to appear, &
(18) Praecipe.

Frank J. Hennessey, Attorneys for Wong Tai.

[File endorsement omitted.]

[fol. 2] IN UNITED STATES DISTRICT COURT

BILL OF INDICTMENT—Filed Sept. 18, 1924

At a stated term of said Court begun and holden at the City and County of San Francisco, within and for the Southern Division of the Northern District of California on the second Monday of July in the year of our Lord One thousand nine hundred and twenty-four,

The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present that Wong Tai, alias Wong Sue Jun, alias Wong Wai, hereinafter called the defendant, heretofore, to-wit, on or about September 10, 1922, the exact date being to the Grand Jurors, aforesaid unknown, at the City and County of San Francisco, in the Southern Division of the Northern District of California, then and there being, did then and there unlawfully, wilfully, knowingly and feloniously conspire, combine, confederate and agree with one Ben Drew and with divers other persons to the Grand Jurors unknown, to commit the acts made crimes and offenses by the laws of the United States, to-wit, The Act of February 9, 1909, as amended January 17, 1914, and as amended May 26, 1922, that is to say; the said defendant did, at the time and place aforesaid, knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree with one Ben Drew and with divers other persons to the Grand Jurors, aforesaid, unknown, to unlawfully, wilfully, knowingly and feloniously receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain narcotic drugs, to-wit, smoking opium, the said defendant well knowing the said drugs to have been imported into the United States and into the jurisdiction of this Court contrary to law.

[fol. 3] That said conspiracy, combination, confederation and agreement between the said defendant and the said Ben Drew and the said divers other persons whose names are as aforesaid to the Grand Jurors unknown, was continuously throughout all the times from and after the month of September, 1922, and at all the times in this indictment mentioned and referred to and particularly at the time of the commission of each of the overt acts in this indictment hereinafter set forth, in existence and process of execution.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant did at the City and County of San Francisco and within the jurisdiction of this Court, receive, conceal, buy, sell and facilitate the transportation after importation of certain narcotic drugs, to-wit, three small sacks containing a number of tins of opium, the exact number of tins of opium contained in said sacks being to the Grand Jurors, aforesaid, unknown, which arrived on the Steamer President Pierce on or about February 24, 1923, and without the knowledge and consent of the custom officers of the United States and more particularly the custom officers in charge of the Port at San Francisco, aforesaid.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant did at the City and County of San Francisco and within the jurisdiction of this Court, receive, conceal, buy, sell and facilitate the transportation after importation of certain narcotic drugs, to-wit, five sacks containing a number of tins of opium, the exact number of tins of opium contained in said sacks being to

the Grand Jurors aforesaid, unknown, which arrived on the Steamer [fol. 4] Nanking on or about May 10, 1923, the exact date being to the Grand Jurors unknown and without the knowledge and consent of the custom officers of the United States and more particularly the custom officers in charge of the Port at San Francisco, aforesaid.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant did at the City and County of San Francisco and within the jurisdiction of this Court, receive, conceal, buy, sell and facilitate the transportation after importation of certain narcotic drugs, to-wit, three sacks containing a number of tins of opium, the exact number of tins of opium contained in said sacks being to the Grand Jurors aforesaid, unknown, which arrived on the Steamer President Wilson on or about May 25, 1923, the exact date being to the Grand Jurors unknown, and without the knowledge and consent of the custom officers of the United States and more particularly the custom officers in charge of the Port at San Francisco, aforesaid.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant did at the City and County of San Francisco and within the jurisdiction of this Court, receive, conceal, buy, sell and facilitate the transportation after importation of certain narcotic drugs, to-wit, five sacks containing a number of tins of opium, the exact number of tins of opium contained in said sacks being to the Grand Jurors aforesaid, unknown, which arrived on the Steamer Taiyo Maru on or about May 27, 1923, the exact date being to the Grand Jurors unknown, and without the knowledge and consent of the custom officers of the United States and more particularly the custom officers in charge of the Port at San Francisco, aforesaid. [fol. 5] And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant did at the City and County of San Francisco and within the jurisdiction of this Court, receive, conceal, buy, sell and facilitate the transportation after importation of certain narcotic drugs, to-wit, five sacks containing a number of tins of opium, the exact number of tins of opium contained in said sacks being to the Grand Jurors aforesaid, unknown, which arrived on the Steamer President Taft on or about June 29, 1923, the exact date being to the Grand Jurors unknown and without the knowledge and consent of the custom officers of the United States and more particularly the custom officers in charge of the Port at San Francisco, aforesaid.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant did at the City and County of San Francisco and within the jurisdiction of this Court, receive, conceal, buy, sell and facilitate the transportation after importation of certain nar-

cotic drugs, to-wit, two sacks containing a number of tins of opium, the exact number of tins of opium contained in said sacks being to the Grand Jurors aforesaid, unknown, which arrived on the Steamer President Lincoln on or about August 19, 1923, the exact date being to the Grand Jurors unknown, and without the knowledge and consent of the custom officers of the United States and more particularly the custom officers in charge of the Port at San Francisco, aforesaid.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object [fol. 6] thereof, the said defendant did at the City and County of San Francisco and within the jurisdiction of this Court, receive, conceal, buy, sell and facilitate the transportation after importation of certain narcotic drugs, to-wit, one sack containing a number of tins of opium, the exact number of tins of opium contained in said sack being to the Grand Jurors aforesaid, unknown, which arrived on the Steamer President Cleveland on or about February 3, 1924, the exact date being to the Grand Jurors unknown, and without the knowledge and consent of the custom officers of the United States and more particularly the custom officers in charge of the Port at San Francisco, aforesaid;

Against the peace and dignity of the United States of America, and contrary to the form of the said United States of America in such case made and provided.

Sterling Carr, United States Attorney.

[File endorsement omitted.]

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED DEMURRER—Filed Nov. 1, 1924

The defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai, filing this his amended demurrer to the indictment herein, says that the said indictment is not sufficient in law for him, the said defendant, to plead unto, and assigns the following as his grounds of demurrer;

I

That the said indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

II

That the said indictment is vague and indefinite and uncertain in failing to show:

1st. Whether the alleged conspiracy was carried out.
2nd. When such alleged conspiracy was carried out.

3rd. What acts were carried out pursuant to said conspiracy and when such acts were commenced and consummated.

III

That there is no sufficient showing of unlawful means of the commission of any overt act or acts by this defendant.

IV

That there is no sufficient allegation or showing of commence-[fol. 8] ment or object of alleged conspiracy.

V

That the attempted statements of facts seeking to show commission of an overt act or overt acts are, and each of them is, vague, indefinite and uncertain in failing to show:

1st. At what time or times, from what person or persons, at what place or places, and under what circumstances if at all, this defendant received any opium or sack or sacks containing tins of opium.

2nd. At what time or times, at what place or places and under what circumstances if at all, this defendant concealed opium or a sack or sacks containing tins of opium.

3rd. At what time or times, of what person or persons and at what place or places this defendant, if at all, bought opium or sack or sacks containing tins of opium.

4th. To what persons or persons, at what place or places, at what time or times, and under what circumstances, if at all, this defendant sold any opium or any sack or sacks containing tins of opium.

5th. Where and at what time or times and between what places and in what manner and under what circumstances, if at all, this defendant transported or facilitated the transportation of any opium or of any sack or sacks containing tins of opium.

VI

That the alleged conspiracy does not show facts sufficient to bring it within any statute of the United States of America.

VII

That the said indictment and the allegations thereof, particularly the allegations in respect to purported commission of overt acts which said indictment seeks to allege, are so vague, indefinite and uncertain as to fail to inform this defendant of the nature or the cause of the

[fol. 9] accusation against him, or in what manner he has violated the law pertaining to a conspiracy to receive, conceal, buy, sell or facilitate the transportation or concealment after importation of narcotic drugs, or any other law, or to exhibit to him such facts from which he may ascertain the nature of the charges against him, or to enable him to avail himself of conviction or acquittal thereof for protection against a further prosecution for the same cause.

VIII

That said indictment does not inform defendant of the nature or cause of the accusation or the attempted accusation against him and was presented, issued and found, and is in violation of and contrary to the provisions of Article VI of the amendments to the Constitution of the United States of America and of the right of defendant, guaranteed by said constitutional provisions, to be informed of the nature and cause of the accusation.

For all which causes of demurrer existing, this defendant says that the said indictment is demurrable and not sufficient in law to make plea unto.

Wherefore, he prays that said indictment be quashed and that he go hence without date.

George J. Hatfield, Attorney for Defendant.

Upon stipulation of the U. S. District Attorney therefor, it is hereby ordered that the foregoing amended demurrer be filed in the place and stead of the demurrer to the indictment heretofore filed.

Dated November 1st, 1924.

Received a copy of the within amended demurrer to the Indictment in U. S. vs. Wong Tai, #15559, this 29th day of October, 1924.

Sterling Carr.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING DEMURRER—Nov. 1, 1924

This case came on regularly for hearing on Demurrer to Indictment. Defendant was present with Attorney, Geo. J. Hatfield, Esq., T. J. Riordan, Esq., Asst. U. S. Atty., was present for and on behalf of United States. After hearing Attorneys, ordered Demurrer overruled and to which order Mr. Hatfield entered Exception. Thereupon defendant plead "Not Guilty." After hearing Attorneys, ordered case continued to Nov. 22, 1924 to be set for trial.

Page 172, Vol. 64, of the Minutes.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR BILL OF PARTICULARS—Filed Feb. 9, 1925

Comes now Wong Tai, alias Wong Sue Jun, alias Wong Wai, defendant in the above entitled action and moves the above entitled Court for the order of said Court requiring and directing the plaintiff above named to furnish and deliver unto said defendant a bill of particulars setting forth and specifying concisely and with particularity, the specific facts and circumstances in relation to the commission of the several overt acts mentioned or referred to in the indictment on file herein, more particularly specifying and stating:

1. At what time or times, from what person or persons, at what place or places and under what circumstances if at all, this defendant received any opium or sack or sacks containing tins of opium which arrived on the Steamer President Pierce on or about February 24, 1923 and/or which arrived on the Steamer Nanking on or about May 10, 1923, and/or which arrived on the Steamer President Wilson on or about May 25, 1923, and/or which arrived on the Steamer Taiyo Maru on or about May 27, 1923, and/or which arrived on the Steamer President Taft on or about June 29, 1923, and/or which arrived on the Steamer President Lincoln on or about August 19, 1923, and/or which arrived on the Steamer President Cleveland on or about February 3, 1924.

[fol. 12] 2. At what time or times, at what place or places, in the presence of what person or persons in what quantity or quantities, in what container, thing, building or structure, and how or in what manner and under what circumstances if at all, this defendant concealed opium or a sack or sacks containing tins of opium which arrived on the Steamer President Pierce on or about February 24, 1923, and/or which arrived on the Steamer Nanking on or about May 10, 1923, and/or which arrived on the Steamer President Wilson on or about May 25, 1923, and/or which arrived on the Steamer Taiyo Maru on or about May 27, 1923, and/or which arrived on the Steamer President Taft on or about June 29, 1923, and/or which arrived on the Steamer President Lincoln on or about August 19, 1923, and/or which arrived on the Steamer President Cleveland on or about February 3, 1924.

3. At what time or times, of what person or persons at which place of places, in what quantity or quantities, at what price or prices and under what circumstances if at all, this defendant bought opium or a sack or sacks containing tins of opium which arrived on the Steamer President Pierce on or about February 24, 1923, and/or which arrived on the Steamer Nanking on or about May 19, 1923, and/or which arrived on the Steamer President Wilson on or about May 25, 1923, and/or which arrived on the Steamer Taiyo Maru on or about May 27, 1923, and/or which arrived on the Steamer President Taft on or about June 29, 1923, and/or which arrived on the Steamer President Lincoln on or about August 19,

1923, and/or which arrived on the Steamer President Cleveland on or about February 3, 1923.

4. To what person or persons, at what place or places, at what time or times, in what quantity or quantities, at what price or prices and under what circumstances if at all, this defendant sold any opium or any sack or sacks containing tins of opium which ar- [fol. 13] rived on the Steamer President Pierce on or about February 24, 1923, and/or which arrived on the Steamer Nanking on or about May 19, 1923 and/or which arrived on the Steamer President Wilson on or about May 25, 1923, and/or which arrived on the Steamer Taiyo Maru on or about May 27, 1923 and/or which arrived on the Steamer President Taft on or about June 29, 1923, and/or which arrived on the Steamer President Lincoln on or about August 19, 1923, and/or which arrived on the Steamer President Cleveland on or about February 3, 1924.

5. At what place or places, at what time or times, in what quantity or quantities, between what places, upon what vehicle or vehicles, through what agency or agencies or instrumentalities, in what manner and under what circumstances if at all, this defendant transported or facilitated the transportation of opium or of a sack of sacks containing tins of opium which arrived on the Steamer President Pierce on or about February 24, 1923, and/or which arrived on the Steamer Nanking on or about May 10, 1923, and/or which arrived on the Steamer President Wilson on or about May 25, 1923, and/or which arrived on the Steamer Taiyo Mary on or about May 27, 1923, and/or which arrived on the Steamer President Taft on or about June 29, 1923, and/or which arrived on the Steamer President Lincoln on or about August 19, 1923, and/or which arrived on the Steamer President Cleveland on or about February 3, 1924.

The above motion is made upon each of the following grounds, towit:

1. That the said indictment and the allegations thereof, particularly the allegation in respect to purported commission of overt acts which said indictment seeks to allege are so vague, indefinite and uncertain as to fail to inform this defendant of the nature or cause of the accusations against him or in what manner he has violated the law pertaining to a conspiracy to receive, conceal, buy, [fol. 14] sell or facilitate the transportation or concealment after importation, of narcotic drugs, or any other law, or to exhibit to him such facts from which he may ascertain the nature of the charges against him, or to enable him to avail himself of conviction or acquittal therefor, for protection against a further prosecution for the same cause.

2. That the said indictment does not inform defendant of the nature of the cause or the accusations or the attempted accusations against him and that unless said particulars are furnished and delivered to this defendant he will be deprived of his constitutional right to be informed of the nature and cause of accusation which right is guaranteed to him by the provisions of Article VI of the amendments to the Constitution of the United States of America.

3. That the deliver- to this defendant of the said particulars and each and all thereof is necessary and indispensable to enable him to prepare for said trial, to prepare his defense and to defend himself at the trial of the above entitled action.

4. That the furnishing to this defendant of said particulars and each thereof is necessary and indispensable to a full and fair trial, that without the same and each thereof, defendant cannot make the necessary preparations for a complete or proper defense.

5. That the averments of the indictment are in general and ambiguous terms and wholly fail to state precisely and explicitly, the facts or any of the facts concerning the overt act or acts which it is charged said defendant committed pursuant to the alleged conspiracy.

Said motion is based upon all the records, papers, pleadings and files in the above entitled Court in the above entitled action and upon the affidavit of said defendant, which affidavit is hereby referred to and made a part hereof and herewith filed in the records of said action.

George J. Hatfield, Attorney for Defendant.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WONG TAI IN SUPPORT OF MOTION FOR BILL OF PARTICULARS—Filed Feb. 9, 1925

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Wong Tai, alias Wong Sue Jun, alias Wong Wai, being first duly sworn, deposes and says:

That he is the defendant in the above entitled action; that he is ignorant of the dates, times, places, names, persons, things, agencies, facts and circumstances attending the alleged commission of each and several the overt acts charged and/or attempted to be charged in the indictment herein; that it is necessary and material to this defense in this action that he shall have rendered to him a bill of particulars thereof.

Wong Tai.

Subscribed and sworn to before me this 19th day of December, 1924. Nette Hamilton, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[fol. 16] On back

Denied. The indictment seems sufficiently definite in view of unknown involved—and defendant moves for too much details of evidence.

Bourquin, J.

February 14, 1925.

Received a copy of the within Motion and a copy of the within Affidavit, this 9th day of February, 1925.

Sterling Carr, by Thos. J. Riordan.

It is hereby stipulated by and between counsel for defendant herein and the United States District Attorney that the within motion may be heard without any further notice by either counsel or either party thereto, on the 14th day of February, 1925, at the hour of 10 o'clock A. M.

Sterling Carr, United States Attorney. George J. Hatfield, Attorney for Defendant.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR BILL OF PARTICULARS—Feb. 16, 1925

Ordered that defendant's motion for Bill of Particulars be denied. Page 61, Vol. 65, of the Minutes.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY OF JUDGMENT—Feb. 26, 1925

This case came on regularly this day for trial of defendant, Wong Tai, upon Indictment filed herein against him. Defendant was present with Attorney, George J. Hatfield. T. J. Riordan, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Upon calling of case, all parties answering ready for trial, Court ordered same proceed and that the Jury Box be filled from regular panel of Trial Jurors of this Court. Accordingly, the hereinafter named persons, having been duly drawn by lot, sworn, examined and accepted, were duly sworn as Jurors to try issues herein, viz: Robert Quinton, Al. Adams, Wyatt H. Allen, Cutler Paige, Ralph P. Thornton, Chas. J. LeNoir, John Whicher, H. M. Cochran, Reinhold L. Anderson, Samuel Breck, Saml. J. Donohue, Chas. K. Sumner.

Mr. Riordan called certain persons as witnesses on behalf of United States, each of whom was duly sworn and examined, viz: B. Drew, J. E. Marrah, Lillian Cube, F. McNern, Edward Skaham, W. R. Botkin, H. L. Albers. Mr. Riordan introduced in evidence on behalf of United States certain exhibits, which were filed and marked

U. S. Exhibits Nos. 1 and 2, and rested case on behalf of United States.

Mr. Hatfield called certain persons as witnesses on behalf of defendant, each of whom was duly sworn and examined, to-wit: D. G. Swinehart and Wong Tai (Defendant); and rested.

[fol. 19] Case was argued by respective counsel and submitted whereupon the Court proceeded to instruct Jury, who, after being so instructed, retired at 3:20 P. M., to deliberate upon a Verdict, and subsequently returned into Court at 3:25 P. M., and upon being called all twelve (12) Jurors answered to their names and were found to be present, and, in answer to question of the Court, stated they had agreed upon a Verdict and presented written Verdict which the Court ordered filed and recorded, viz:

"We, the Jury, find Wong Tai, the defendant at the bar, Guilty as charged.

John Whicher, Foreman."

Ordered Jurors discharged from further consideration of case and from further attendance upon the Court for the present November, 1924, Term:

Defendant was called for judgment. No cause appearing why such judgment should not be pronounced, Ordered that defendant, Wong Tai, be imprisoned for thirteen (13) months in the United States Penitentiary at McNeil Island, State of Washington, and pay fine in sum of One Thousand ($1,000.00) Dollars or, in default of fine, defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law. Ordered that defendant stand committed to custody of U. S. Marshal for this District to execute said judgment, and that a Commitment issue.

On motion of Mr. Riordan, ordered that the U. S. Exhibits be returned and accordingly same were delivered to Mr. W. R. Botkin in open Court.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT—Filed Feb. 26, 1925

We, the Jury, find Wong Tai, the defendant at the bar, guilty as charged.

John Whicher, Foreman.

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT

T. J. Riordan, Esq., Assistant United States Attorney, and the defendant with his counsel came into Court. The defendant was duly informed by the Court of the nature of the Indictment filed on the 18th day of September, 1924, charging him with the crime of viol. Sec. 37 C. C.—Conspiracy to Violate the Act of Feb. 9, 1909, as amended etc.; of his arraignment and plea of Not Guilty; of his trial and the verdict of the Jury on the 26th day of February, 1925, to-wit: "We, the Jury find Wong Tai, the defendant at the bar, Guilty as charged, John Wieher, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court; thereupon the Court rendered its Judgment; That, Whereas, the said Wong Tai having been duly convicted in this Court of the crime of viol. 37 C. C.—Conspiracy to viol. the Act of Feb. 9, 1909, as amended, etc.;

It is therefore ordered and adjudged that the said Wong Tai be imprisoned for the period of thirteen (13) months in the United States Penitentiary at McNeil Island, Washington, and to pay a fine in the sum of One Thousand ($1,000.00) Dollars; further ordered that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged in due course of law.

Judgment entered this 26th day of February, A. D. 1925.

Walter B. Maling, Clerk, by C. W. Calbreath, Deputy Clerk.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR MODIFICATION OF JUDGMENT—Feb. 27, 1925

In this case Geo. J. Hatfield, Esq., Attorney for defendant moved the Court for a modification of the judgment herein. After hearing Mr. Hatfield and T. J. Riordan, Esq., Asst. U. S. Atty., ordered said motion be denied.

[fols. 23-27] IN UNITED STATES DISTRICT COURT

[Title omitted]

Bill of Exceptions to Order Overruling Amended Demurrer to Indictment—Filed Oct. 25, 1924

CAPTION

Be it remembered that heretofore and on or about the 18th day of September, 1924, the Grand Jury of the United States of America, in and for the Northern District of California, First Division, did find and return in, to and before the above entitled Court, its indictment against the defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai, in words and figures as follows, towit:

BILL OF INDICTMENT—Omitted; printed side page 2 ante

[fol. 28] PLEA OF NOT GUILTY

And be it further remembered that thereafter and on the 4th day of October, 1924, said defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai, pleaded not guilty to the indictment in the above entitled action.

MINUTE ENTRY

And be it further remembered that thereafter and on the 25th day of October, 1924, the Court above named, upon oral stitpulation therefor made by the United States District Attorney, in open Court, did make and render its order herein permitting and authorizing the said defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai, to withdraw said plea and to demur to the said indictment. Thereupon, pursuant to said order and said stipulation, said defendant did withdraw said plea and did file herein a demurrer to said indictment together with a memorandum of points and authorities in support of said demurrer.

And be it further remembered that the said demurrer and the said memorandum of authorities in support of said demurrer and the filing marks thereon and upon each of them are in words and figures as follows, to-wit:

DEMURRER TO INDICTMENT

The defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai, comes and demurs to the said indictment herein and says that the same is not sufficient in law for him, the said defendant, to plead unto, and assigns the following as his grounds of demurrer:

I

That the said indictment is vague and indefinite and does not set [fol. 29] forth sufficient facts to enable the defendant to properly assert his defense.

II

That the said indictment is vague and indefinite and uncertain in failing to show:

1s. Whether the alleged conspiracy was carried out.

2nd. When such alleged conspiracy was carried out.

3rd. What acts were carried out pursuant to said conspiracy and when such acts were commenced and consummated.

III

That there is no sufficient showing of unlawful means or the commission of any overt act or acts by this defendant.

IV

That there is no sufficient allegation or showing of commencement or object of alleged conspiracy.

V

That the attempted statements of facts seeking to show commission of an overt act or overt acts are, and each of them is, vague, indefinite and uncertain in failing to show:

1st. At what time or times, from what person or persons, at what place or places, and under what circumstances if at all, this defendant received any opium or sack or sacks containing tins of opium.

2nd. At what time or times, at what place or places and under what circumstances if at all, this defendant concealed opium or a sack or sacks containing tins of opium.

3rd. At what time or times, of what person or persons and at what place or places this defendant, if at all, bought opium or sack or sacks containing tins of opium.

4th. To what person or persons, at what place or places, at what time or times, and under what circumstances, if at all, this defendant sold any opium or any sack or sacks containing tins of opium.

[fol. 30] 5th. Where and at what time or times and between what places and in what manner and under what circumstances, if at all, this defendant transported or facilitated the transportation of any opium or of any sack or sacks containing tins of opium.

VI

That the said indictment and the allegations thereof, particularly the allegations in respect to purported commission of overt acts which said indictment seeks to allege, are so vague, indefinite and uncertain as to fail to apprise this defendant of the nature of the charge against him, or in what manner he has violated the law pertaining to a conspiracy to receive, conceal, buy, sell or facilitate the transportation or concealment after importation of narcotic drugs, or to exhibit to him such facts from which he may ascertain the nature of the charges against him, or to enable him to avail himself of conviction or acquittal thereof for protection against a further prosecution for the same cause.

For all of which causes of demurrer existing, this defendant says that the said indictment is demurrable and not sufficient in law to make plea unto.

Wherefore, he prays that said indictment be quashed and that he go hence without date.

Geo. J. Hatfield, Attorney for Defendant.

[File endorsement omitted.]

[fols. 31-33] And be it further remembered that on the 1st day of November 1924, the Court above named, upon the oral stipulation therefor made by the United States District Attorney in open Court, did make and render its order herein permitting and authorizing the said defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai, to file in the above entitled action, an amended demurrer to the said indictment, to supersede said demurrer first filed. Thereupon and upon the 1st day of November 1924 said defendant pursuant to said order and said stipulation did file said Amended Demurrer to said Indictment. The said Amended Demurrer together with the endorsements and filing marks thereon is in words and figures as follows, towit:

(Title of Court and Cause)

AMENDED DEMURRER TO INDICTMENT—Omitted; printed side page 7, ante

---

[fol. 34] ORDER OVERRULING AMENDED DEMURRER

Be it further remembered that on the 1st day of November 1924, and in the forenoon of said day, the said amended demurrer came on for hearing before the Honorable John S. Partridge, District Judge of said Court, the United States of America being represented

by Thomas J. Riordan, Esq., Assistant United States District Attorney and the defendant being represented by Geo. J. Hatfield, Esq.,

Thereupon, Geo. J. Hatfield, Esq., presented said amended demurrer to the indictment and thereupon argued the said demurrer.

Thereupon Thomas J. Riordan, Esq., Assistant United States District Attorney, argued said demurrer. The said demurrer was thereupon ordered submitted and the same was submitted to the Court, whereupon said Honorable John E. Partridge on the first day of November, 1924, and in the forenoon of said day did make and render his decision in the above entitled cause upon said demurrer and did thereby overrule said demurrer, and that said defendant duly excepted to the said decision and order of the Court overruling said demurrer.

[fols. 35-39] In United States District Court

[Title omitted]

Bill of Exceptions to Order Denying Motion for Bill of Particulars

Caption

Be it remembered that heretofore and on or about the 18th day of September, 1924, the Grand Jury of the United States of America, in and for the Northern District of California, First Division, did find and return in, to and before the above entitled Court its indictment against the said defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai, in words and figures as follows, towit:

Bill of Indictment—Omitted; printed side page 2, ante

[fol. 40 & 41] And be it further remembered that thereafter and on the 9th day of February, 1925, said defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai, filed in the above entitled action, the certain motion for the order of the Court above named requiring and directing the plaintiff above named to furnish and deliver unto said defendant a Bill of Particulars setting forth concisely and with particularity the specific facts and circumstances in relation to the commission of the several overt acts mentioned or referred to in the said indictment on file herein, more particularly specifying and stating:

Motion for a Bill of Particulars—Omitted; printed side page 11, ante

[fol. 42] together with an "Affidavit of Defendant in Support of Motion for Bill of Particulars," attached to the said Motion for Bill

of Particulars, and a "Stipulation" of the United States District Attorney and the Attorney for the said Defendant, and "Memorandum of Authorities upon Motion of Defendant for Bill of Particulars" and a "Notice of Motion for Bill of Particulars."

And be it further remembered that said Motion, Affidavit, Stipulation, Memorandum of Authorities upon Motion of Defendant for Bill of Particulars and Notice of Motion for Bill of Particulars and the filing marks thereon and upon each of them are in words and figures, as follows, towit:

[fols. 43-45] Motion for Bill of Particulars—Omitted; printed side page 11, ante

---

[fols. 46 & 47] Affidavit of Wong Tai in Support of Motion for Bill of Particulars—Omitted; printed side page 15, ante

---

[fol. 48] In United States District Court

Notice of Motion for Bill of Particulars—Filed Feb. 9, 1925

To the United States of America, plaintiff above named, and to Honorable Sterling Carr, United States District Attorney:

You and each of you will please take notice and notice is hereby given that on Saturday the 14th day of February, 1925, at the hour of ten o'clock A. M., or as soon thereafter as counsel may be heard, in the Court Room of said Court, upon the third floor of the Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, before the Honorable George M. Bourquin, the Judge presiding therein, defendant above named will move for an order of said Court requiring and directing said plaintiff to furnish and deliver to said defendant a bill of particulars in said cause, which said bill of particulars is more particularly described in the written motion therefor served upon you and filed herewith, which said written motion is hereby referred to and by this reference made a part hereof.

You and each of you will further take notice and notice is hereby given that the said motion will be based upon all and each of the grounds stated in said written motion and upon all the papers, pleadings and documents mentioned therein, including particularly the indictment on file herein and the affidavit of said defendant in support of said motion, which said affidavit is hereby referred to and by this reference incorporated herein, and also upon said defendant's memorandum of authorities herewith served upon you.

Geo. J. Hatfield.

[fols. 49 & 50] Received a copy of the within Notice of Motion for Bill of Particulars this 9th day of February 1925.

"Sterling Carr," U. S. District Attorney.

[File endorsement omitted.]

SUBMISSION OF BILL OF PARTICULARS

And be it further remembered that thereafter and on the 14th day of February, 1924, at the hour of 10 o'clock in the forenoon of said day, the said motions came on for hearing before the Honorable George M. Bourquin, District Judge of the United States, then and there sitting and presiding in said Court, the United States of America being represented by Thomas J. Riordan, Esq., Assistant United States District Attorney, and defendant being represented by Geo. J. Hatfield, Esq.

Thereupon said Geo. J. Hatfield, Esq., moved the above named Court for the order of said Court requiring and directing the plaintiff above named to furnish and deliver unto defendant above named, a Bill of Particulars setting forth and specifying concisely and with particularity the specific facts and circumstances in relation to the commission of the several overt acts mentioned and referred to in the indictment on file herein, more particularly specifying and stating:

MOTION FOR BILL OF PARTICULARS—Omitted; printed side page 11, ante

[fol. 51] And introduced in evidence the said and foregoing indictment on file herein, the said written "Motion for Bill of Particulars," the said Affidavit of Defendant in Support of Motion for Bill [fol. 52] of Particulars" attached to said written Motion, the said "Stipulation" of the United States District Attorney and the Attorney for the said Defendant, and the "Memorandum of Authorities upon Motion of Defendant for Bill of Particulars" and the said "Notice of Motion for Bill of Particulars." Thereupon, said motion for Bill of Particulars was ordered submitted by the Court.

And be it further remembered that thereafter and on the 14th day of February, 1925, said Honorable George M. Bourquin, did make and render his decision in the above entitled cause upon said motion for bill of particulars and did thereby deny said motion, and that said defendant duly excepted to the said decision and order of the Court denying said motion for bill of particulars.

And now, within the time allowed by law and the rules and orders of this court duly and regularly made in this behalf, the defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai hereby proposes the above and foregoing as and for his Bill of Exceptions upon Writ of Error or Appeal herein and prays that the same be settled, allowed, signed and authenticated by this court as in proper form and as con-

forming to the truth, and as a true Bill of Exceptions herein, and that it be made a part of the record in this cause.

Dated at San Francisco this 24th day of February, 1925.

Geo. J. Hatfield, Attorney for Defendant.

Due service of the foregoing proposed Bill of Exceptions and receipt of a copy thereof is admitted this 24th day of February, 1925.

Sterling Carr, United States Attorney.

p53

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

Bills of Exceptions—Filed March 25, 1925

CAPTION

Be it remembered that heretofore the grand jury of the United States, in and for the Northern District of California, did find and return in the above-entitled court its indictment against the defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai, and thereafter the said Wong Tai, alias Wong Sue Jun, alias Wong Wai, appeared in said court, and, having duly pleaded as shown by the record herein, and the cause being at issue the same came on for trial on February 26, 1925 before the Honorable George M. Bourquin, District Judge, and a jury duly empaneled, the United States being represented by T. J. Riordan, Esq., Assistant United States Attorney, and the defendant Wong Tai, alias Wong Sue Jun, Alias Wong Wai, being represented by Geo. J. Hatfield, Esq., and R. L. McWilliams, Esq., the following proceedings were had:

TESTIMONY OF B. DREW

B. DREW, a witness called on behalf of the United States, being first duly sworn, testified as follows:

[fol. 54] I live at Pacific and Powell Streets in San Francisco. I have been charged under a separate indictment for this same offense. I am willing to tell all I know about this case. No promises of reward or immunity have been extended to me by anybody, to get my testimony, nor any threats of any kind. I know Wong Tai, who sits over at this table.

The Court:

Q. You understand that you are not obliged to testify to anything that will incriminate you unless you want to. You are willing to testify freely, or do you want to claim the right not to testify?

A. I will testify freely.

I first met this defendant along about November, 1922.

[fol. 55] Mr. Riordan:

Q. Just tell the court and jury how you came to meet him, under what circumstances?

A. Well, I met a fellow by the name of Mr. Dunlap, who is dead now, and I met him over on 526 Columbus Avenue; I seen him there quite often.

Q. What kind of a place is that?

A. It was a soft drink parlor. Well, I got pretty well acquainted with him, he was there every day——

Mr. McWilliams: Who is he referring to?

Mr. Riordan: To a man by the name of Dunlap.

A. (Cont'g:) And then finally we got pretty personal there one day, and the old man——

Mr. McWilliams: I object to this conversation as apparently a conversation with Mr. Dunlap and therefore hearsay.

The Court: If it is not connected up with this defendant eventually it will be stricken, on motion, but the Government cannot prove its case all at once. As there is a charge of conspiracy they must make it out of the acts and conduct of the various alleged conspirators. Objection at this time will be overruled.

Mr. McWilliams: Exception.

A. Then I got pretty personal with Mr. Dunlap and he found that I came from the islands and he asked me if I could not swim.

Mr. Riordan:

Q. What did you tell him?

A. I told him I could, but I did not know if I could stand the cold water here. Then he said to me if I could see a boy from the Islands that could swim, and I saw a party by the name of Lyons that was a life saver in the Sutro Baths—not the Sutro Baths but the Lurline Baths—and I asked Mr. Lyons, and he said he was willing but he did not know if he could stand the cold water, and he could not swim very well, but he told me he knew a boy that was working in the baths there, and he got him on the phone, and he called him over to his house that night.

[fol. 56] Mr. McWilliams: May I also interpose an objection to this conversation with this second man as also hearsay.

The Court: The same ruling.

Mr. McWilliams: Exception.

This man was Mr. Marrah. I talked to Marrah about it and he said he was willing to swim down on the water front. Then I reported to Dunlap and told him. He was working with another partner and wanted to arrange for me to go out and work independently so the partner would not know about it. I got somebody that knew how to manipulate a boat in through the docks there and reported to Dunlap. He said the first opportunity he would give me a job. In

November he reported to me that he had a job. He told me the Steamer Niles had a load and we could go and get it.

Q. A load of what?
A. Stuff he referred to it as all the time.
Q. Meaning what?

Mr. McWilliams: I object to what it meant.

A. I know what it meant.

Mr. Riordan:

Q. What did it mean?
A. Opium.

The Court: Objection overruled.
Mr. McWilliams: Exception.

I then went down and tried to get this stuff. I told Dunlap to make arrangements to have the load thrown into the water with a rope so that it would come near the surface but not to the surface, with a block of wood, so we would not have to dive down far. Mr. Marrah was to dive down into the water and *and* get the block with a rope attached to the block. The fellow that showed us how to get out there, and Marrah and myself, went out there to try to get the load. It was a failure. Then we went up on Jackson Street where the Chinaman lived, and I put in a report that we did not get it. Dunlap had told me where to go to report. There were [fol. 57] there this same Chinaman Wong Tai and three or four other Chinese. I told him we could not get it and that I would try on the next night with a grappling hook. Me and Marrah and the other gentleman went out the same way with grappling hooks. We attempted to land it. We never landed it. I went up with another man, McNern, to the Chinaman's place. We put in a report and I heard all the Chinamen grumbling about it. This defendant was one of them. We were talking to him and another Chinese. I told Wong Tai we would keep on trying. He said for us to quit, he would get another man. Subsequently, Dunlap told me he got that load and to come down and help bring it up. We got the load, about five or six bags, I have forgotten. There were just Dunlap and myself. Neither Marrah nor McNern was there. I took the load out to my sister's house. Her name is Mrs. Cube. I hid it in my bedroom. I reported to this Chinaman and a couple of other that we got it and I had it. This Chinaman and three or four other came. Three came in the house and the Chauffeur remained outside. There were just my sister and myself at my house at the time. This Chinaman came into the house, unpacked it, put it in little bags and tied them up and went out.

The next time Dunlap met us again and he told us to try and get a new scheme, so Marrah and I made up a new scheme. Instead of dropping it into the water Marrah swam from one pier to the boat and got the string and pulled it back to the pier that he left

and waited there until they threw it overboard and then he could pull it in.

That was in December, 1922, that Marrah and I went out in the boat. We got underneath pier 44. Marrah got the string but they didn't use no float so that it would float in the water and it went right down to the bottom, we could not pull it in. There was to be a float attached to Buoy the cans up. We waited until twelve o'clock and then went back to Chinatown and reported to [fol. 58] the defendant He called me out.

Q. Were you subsequently called in by the Chinaman or by Dunlap or anybody else?

Mr. McWilliams: I object to this as leading.
The Court: This is merely preliminary. He may answer.
Mr. McWilliams: Exception.

Dunlap called me in again. We went down to the Fourth Street bridge and there got on a ship and went out to pier 44 and got the load. Dunlap took me to where it was. I had made arrangement with this Chinaman before I went down there. I told him, when I phone to you, that means I have got it and I want you to meet me out by Dreamland Rink. I phoned. I just told him all right. Then I went to Dreamland Rink. The defendant and four or five other Chinamen met me there. I did not reload the stuff. I just gave them the car.

I had other deals of a like nature along the last part of 1922. Dunlap broke with his partner and told me he wanted to work with me and Marrah. He worked with us. I made arrangement for a load of it from the President Taft. We went down the same way and we got the load. I telephoned to Wong Tai to come out to Dreamland Rink the same way and get the load. It was gotten in the same way. One bag of it, if I remember right.

Dunlap was the collector. I never dealt at all with this defendant.

We got a load on the President Pierce February, 1923. About three bags, which was handled in the same way.

The next load we got about five or six bags. I have forgotten exactly now. The Nanking laid at pier 46, and it was thrown in the water and had a rope tied to it but we had to take grappling hooks to pull it up. I delivered it in the same manner to Wong Tai and some other Chinamen.

[fol. 59] We got a load off the President Wilson. I think we got three bags off of it. It was delivered to these same Chinese in the same manner.

The Taiyo Maru, May 27, 1923. It was thrown of the offshore side of the boat. We hooked it in, five bags.

The next load I think was in June, the President Taft. Dunlap was with me. There were so many lights on the offshore side of the boat that we gave it up as a failure that night. Then Dunlap and I reported to Wong. Told them there were too much lights. He said he would get somebody else to do it. They got the load but could not pull it in and he called me up.

Mr. Riordan:

Q. Who called you?
A. Wong and told me to go out with him.

Mr. McWilliams: I will object on the ground that it does not appear that he knew it was the defendant Wong that called him up.
The Court: Proceed.

Mr. Riordan:

Q. Had you been dealing over the 'phone with Wong prior to that time?
A. I gave him my 'phone number because Mr. Dunlap lives in Berkeley, and he could not get him, and he got me to do what I could do.
Q. Could you say for certain at this time that it was Wong Tai that 'phoned or might it have been some other Chinaman?
A. That I could not say.
Q. You could not say it was the defendant?
A. No.

Mr. McWilliams: I move to strike the testimony.
The Court: What are you going to show?
Mr. Riordan: Merely this, that he finally went in on instructions and helped land this load, and that it was delivered.
The Court: You may proceed; the motion will be denied; if it is not connected it will be stricken on motion of counsel.
[fol. 60] Mr. McWilliams: Exception.

He told me they wanted me to go out with him and try to pull that load in. I went out with Wong Tai and Mr. Marrah. We went over to China Basin around a couple of piers and as we were working our way back under the bulkheads it was quite light and he got scared and quit.

Mr. Riordan:

Q. What did you do?
A. He gave it up and then about five or six days after that, after that night, somebody from Wong Tai's place telephoned for me to come down to California Street, it was along about eleven or twelve, and I went down there- and they wanted me to go down to the water front and look if there was a gasoline boat down there.

Mr. McWilliams: I must interpose another objection on the ground that it does not appear that it was anyone alleged to be connected with this conspiracy who either telephoned or extended that invitation, or told him to go down and look if there was a gasoline boat there.
The Court: Overruled.
Mr. McWilliams: Exception.

A. Then I went down to look if I could see any gasoline boat but I could not see any.

Mr. Riordan:

Q. Did you finally help land that load or not?
A. The next day he called me up to come to his store——
Q. (Intg.) When you say "he," who do you mean?
A. Mr. Wong Tai.

Mr. McWilliams: We object on the ground that it has already appeared that he could not recognize the 'phone voice.
The Court: Overruled.
Mr. McWilliams: Exception.

I went over to the store and he told me he got pinched down at the water fron- and that they had took a book out of his pocket [fol. 61] with my name and phone number and the hotel I was living at. Then he told me, I want you to help me tonight. I went over that night. He gave me a Chinese boy to go get that load. I don't know what pier. We got the load and took it up to the other side of town and delivered it to Wong Tai. The first time I had a meeting up here on Bay and Van Ness. I changed the meeting place. He and three or four other- were there.

Dunlap died then and Marrah and I worked alone. Wong gave me a load at one time to go and get. I think off the President Lincoln. He phoned me. I went down to the President Lincoln then and he instructed me to get it after it was thrown in the water. We got three or four bags. I delivered it to Wong there at the same place on Bay and Van Ness.

Q. The "President Cleveland," February 23, 1924, does that mean anything to you?

A. I was instructed by Wong to go down. He had two loads in the water. In one place the offshore side of the boat and in one place he had three bags and in the forward part of the boat there was another bag.

It was pier 42 or 44, something like that. I was trying to get the three sacks but could not work because I could hear footsteps over my head and I had to keep still there. I waited there until about 12 o'clock, then a general scrap came on. Then I beat it. I don't know what happened. I got out of the way. I did not land it that night. Mr. Marrah was with me, just the two of us. The next day the custom inspectors got these three bags but left one bag in the water. That seems to be the forepart of the boat, I imagine about 100 feet away. In the meantime, we let that one bag stay there because in the early part of January I received a phone call to make arrangements to bring some stuff from Honolulu to San Francisco. In answer to that phone call I went down there to the store. I met [fol. 62] Wong Tai and another big *big* Chinaman. The big Chinaman talked very good English, and he was making arrangements, asking which is the best way to ship from Honolulu here. The big fellow was doing the talking at that time. Then I consulted Marrah. I told him, I will have to see my friend about it. I saw Marrah and we agreed to hire a room on Post Street in an Apartment house, The Ambassador. The number of the Apartment was

19. Marrah got that apartment under the name of Elkins. I marked the Street number, apartment house number and everything. I took it back to Wong Tai and this other big Chinaman. I gave it to the other Chinaman. Then I gave them two addresses.

On or about the 24th day of January I received a lot coming from Honolulu, about 100 tins of opium, two boxes. I delivered it to Wong in two parts. I think it was on Friday I gave him 25 or 30. I have forgotten which. He telephoned he had an order and wanted to fill it right away. It was 25 or 30 cans of opium. Then in the evening I gave him the rest, the balance of the 100 up on Van Ness Avenue, near that school near Bay Street. I delivered that by automobile.

Mr. Riordan:

Q. Do you know of your own knowledge what boat that came on?
A. That 100 lot?
Q. Yes?
A. Some Matson boat. I really could not tell you the name.

Mr. McWilliams: We move to strike that as an overt act not alleged in the indictment.

The Court: That is true, but they still can prove it as part of the conspiracy. The motion is denied.

Mr. McWilliams: Exception.

[fol. 63] When I delivered that particular lot I dealt with this defendant and another Chinaman that I never saw before.

After I delivered that hundred, Marrah and I went back to look at the one sack that was still in the water. We found it about six or seven days after, along about February third or second, 1924. I delivered it. I found it on a Saturday night and delivered it the next day, on Sunday. I had arranged to meet him up here on Bay and Van Ness, but when we got there, I think there was a policeman or someone standing around, and I kept right on going. It was broad daylight, so I went out to the Fair grounds, and there was no one in sight there and I drove in the middle of the Fair grounds and he followed me, and when I got in the middle where we could see there was nobody following, I gave him the load. I received money for these two transactions, for the express and that one bag; $800 for the two, $600 in currency and $200 in checks. This defendant paid me that. He paid me in his store up on Jackson street.

Mr. Riordan:

Q I show you two packages here and ask you if you have ever seen these before, just take a look at them?
A I never saw that at all.
Q. Do you know of your own knowledge if an express package came to this apartment house, after the one that you have testified

that you delivered? Do you know that any came of your own knowledge now?

A. The first one I delivered that all right; the second one I did not see at all.

Cross-examination:

Upon cross-examination the witness testified as follows:

I am under arrest in connection with this offense. I was arrested about the 22d of April. Upon being arrested, my bail was fixed at $15,000. After my bail was fixed I had a talk with the arresting officers or certain representatives of the Government. I [fol. 64] really could not say how many talks I had with them within a week or two after my arrest. I was in the habit of seeing them in jail. They came over to see me but I didn't say anything to them. I think it was about September I began to tell them this story that I have given on the witness stand. After I had a talk with the arresting officers and told this version of the affair that I have given on the witness stand, my bail was reduced from $10,000 to $1,000. It was set at $15,000 and they cut it down to $10,000. It was $15,000 and then they cut it to $10,000 and then to $1,000. I know why it was cut from $15,000 to $10,000. They asked me to make a voluntary statement, which I did make. Then they cut the bail to $1,000 after I made the statement. Before that I had made another statement when they cut it from $15,000 to $10,000.

Mr. McWilliams:

Q. And then you made a more sweeping statement?
A. No, I just made one statement.
Q. One statement?
A. Yes.
Q. There were two cuts in your bond.

The Court: We will not waste any more time on that. It stands in the record as admitted.

Mr. McWilliams: I except to your Honor's ruling to permit me not to cross-examine any further on that.

The Court: Very well.

Mr. McWilliams:

Q. The bond for $1,000 that was finally asked you was never filed, was it?

The Court: The records of the court will show. Pass on to what is material.

Mr. McWilliams:

Q. Do you know of your own knowledge whether or not the bond for $1,000 was ever filed?

The Court: The Court admonishes you to leave that part of the case and go on to your other cross-examination. The court inter-
[fol. 65] poses the objection itself.

Mr. McWilliams: I respectfully note an exception.

The Court: Let it be noted.

I never used smoking opium in my life. I never use it in any form. I do not know a Chinaman by the name of Wong Him Sing, or Wong Tai Sing.

Q. As a matter of fact the man with whom you had the transaction that you have referred to was a Chinaman by the name of Wong Him Sing, was it not?

A. What Chinaman are you referring to?

Q. The one with whom you had the transaction that you have referred to, when you mentioned your dealings with Wong. Is that not a fact?

A. I really don't know his name. I know he was a big Chinaman.

Q. Is it not a fact that all of the dealings that you had were with another Chinaman altogether by the name of Wong and not with this particular man here?

A. All of the dealings you say?

Q. Yes.

A. No. He paid me the money, I delivered the goods to him.

Q. To whom?

A. To this Wong Tai.

Q. You say that originally you made your first talk to this defendant and to several others who were gathered together. How did you come to make that response at that time?

A. After I made the failure, the first time in Chinatown?

Q. Yes, the first time you made the report that you told us about.

A. I went up and told them I could not get it.

I told that to about four or five of them, all in a bunch, and he was one of the men there.

Q. To which one of the crowd did you address yourself?

A. I really don't know who was there at that time, who did the talking.

I carried on most of the talking with this man and another small fellow. As I entered the room there was a man met me at the door and took me inside and I met those two inside and two or three others. The small fellow I have referred to I guess he would weigh [fol. 66] about 100 pounds. His name was Wong Too—I don't really know the balance of his name. I don't know the name Wong Him Sing. I say these various Chinamen about three times, whom I met there on that first occasion. After I went out and could not get it, the next day I went out there with grappling hooks and never got it and the next day he told me he would get another man who was experienced. On subsequent occasions, I reported every time to these Chinamen. Altogether, I went about three times to that room to which I first went. I could not give you the number of times I talked to these Chinamen, with reference to all of these transactions

that I have testified to. My best recollection is that it was maybe about twenty times. This same little Chinaman was there every time I went there.

The name of this Chinaman, Wong Tai, I know. I could not tell you what were the names of these other Chinamen. I talked to them on maybe a little more than twenty occasions. They talked to me and I talked to them.

Q. And you don't know the names of any of them?

A. The other little fellow, I called him Wong, and the rest of them around there, I didn't know their names.

Q. How is it that you don't know the names of any of the rest of them although you saw them at least twenty times if not more?

A. They did not talk to me. I just did business with this fellow and the other little fellow. I came in and talked with Wong.

I did not talk to all of them, when there was a bunch of men there, I did most of my talking with Wong Tai or the other fellow. If this fellow Wong Tai weren't there I might just hold a short conversation with them, but there was no business with them. I don't know the names of any other members of the party. I know the little [fol. 67] fellow just by the name of Wong. I don't know the balance of his name, although I did a great deal of business with him as well as this defendant. On several occasions the defendant went out in his automobile and met me; out at the Dreamland rink.

Q. Is it not a fact that the automobile that you met him in was an automobile belonging to this man Wong Him Sing, who has since the prosecution was initiated, fled to Honolulu or is absent: Is that not a fact?

A. I don't know who owned the automobile, but when I would go into the garage I would ask for Wong Tai's car. I went in there once and he gave me that car.

Q. Did not the automobile that you were using on that occasion belong to the little Wong, with whom you did business?

A. I really could not tell you who owned the automobile. I knew it belonged to Wong Tai, because I would go in and ask for Wong Tai's car.

That was a a garage on Pacific Street, just off Stockton.

Q. When did you get out of jail?

Mr. Riordan: I submit that has been covered.

The Court: Objection sustained.

Mr. McWilliams: Exception.

Testimony of J. E. Marrah

J. E. Marrah, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I reside at 4402 California Street. I have been charged in a separate indictment in this conspiracy. I am willing to testify to the facts in this case. Even though they may incriminate me. No

promises of reward or immunity have been extended to me. No threats of any kind by any government officer or other party have been made to me. I know Mr. Drew, who just testified. I was introduced to him around October, 1922, by a man by the name of [fol. 68] Lyons who was at that time a lifeguard at the Lurline Baths where I was working. The reason for this introduction was to enlist my aid due to the fact that I am an underwater swimmer and unload opium from various steamers. Drew got me to go down to the water front here at the docks. From the time of the introduction to my arrest in February, 1924, I took the part in fourteen shipments of opium. The first time I went down was the next day after my introduction to Drew. I went down with him to look at these steamers. The first proposition to me was that he wanted me to swim under the ships, from under the docks to the offshore side and get a line that would be hanging out of the port and take it back under the ship to him under the dock, and after looking at the ships I decided it was impossible because there was not enough clearance between the bottom of the ship and the bottom of the bay. The next occasion I saw Drew after that, about a month later, he told me he had arranged to have the opium dropped with a float, and have the float within ten feet of the surface and it was my part to dive down and put a line on to that float. On Thanksgiving night, 1922, Drew and myself and a man by the name of McNern, who was a city fireman for the City of San Francisco, went in a rowboat from the foot of Harrison street to pier 36, where a load of opium had been dumped from the steamer Niles. After remaining in the water possibly 15 minutes I gave it up as a loss. We came back. About three days later we went out in the same manner again and attempted to drag with grappling hooks. This was a failure, because the line broke. That was the last time I was out after that load. The next trip was the steamer China. On Christmas night, 1922, Drew and I went alone from the foot of Harrison street to pier 46 where the steamer China was lying. We went under pier 44. I swam from pier 44 to the China and received a line which was hanging out of the port and took it back to Drew. After waiting until [fol. 69] about three o'clock in the morning for a signal that the Chinaman on the ship was to give that the opium was dumped overboard, we gave it up and went back home. I had no other connection with that load. In the latter part of January, Drew and myself and Dunlap went to pier 42 where the President Taft was lying and from under pier 40 I swam to the Taft and we received one small sack in that manner. We landed it under the 4th street bridge, under the protection of the bridgekeeper and Drew and I drove to 6th Avenue where he lived and from there he phoned to the man he was working for. From there we drove slowly down Post Street, and between the Park and Dreamland Rink we were met by another machine with two Chinese in it. I did not see this defendant in there. One of those Chinese got out, took the car that Drew and I had. We went home on the car. That was at night.

Q. Would you say that this defendant was not one of the Chinese?

Mr. McWilliams: He said he was not. I object to his cross-examining his own witness.

Mr. Riordan: I am trying to find out whether he recognized him or not.

A. I did not recognize him.

After that I made trips with Dunlap and Drew,—one to the Pierce, the Nanking and Wilson, the Taiyo Maru and Taft. Those were all more or less in the same way I have just described. There are no particular incidents in any of those trips that I now recall, with the exception that some of them were landed in a different manner. Some were dumped between the ship and the dock, and they were brought up by us from under the dock. A couple of loads were dumped on the after part of the ship and were obtained by means of a line across, with a man on each end and a hook in the center, dragging back and forth and obtaining [fol. 70] the load in that way. I went with Drew six times to the meeting place where the stuff was delivered to the Chinese. All of those times the deliveries were made in the same way. At the meeting place on Post street, there was always two men in a car, and I never recognized any of them. They would stop on the opposite side of the street from us and Drew would tell me to get out and start down the street. I would walk away from them. I had an opportunity to observe who those Chinese were only on one occasion. We delivered a load just at daybreak on a Sunday morning and I had almost reached Fillmore street, walking down Post and the Chinaman driving the car stopped and told me to get in and said he would drive me part of the way home. That was, what I was led to believe, the uncle of this defendant. It was not this defendant. I never saw this defendant on any of those trips in the machine. On one occasion, on the load from the Steamer Taft, on or about June 13, 1923, Drew and myself and the defendant went in a rowboat from China Basin to the President Taft, where we were to get a load of opium. After remaining there until eleven o'clock for a signal that was to be given that the line was out so that a man could swim for it, and no signal was given, we returned. There was nothing landed on that trip. After the trip with Dunlap, we landed two loads, one from the Lincoln and one from the Cleveland, two sacks from the Lincoln in August, 1923, and one sack from the Cleveland in February, 1924. Those deliveries were made during the noon hour on Sunday. I was not present. I don't know about those deliveries. About January 1st Drew asked me if I could rent an apartment for him under the name of J. E. Elkins, and make it appear that there was some one living there by placing old clothing in there. On January 11th I rented apartment 19 at 948 Post street in this city under the name of J. E. [fol. 71] Elkins. About January 24th a shipment of two boxes arrived, shipped as glassware from Honolulu, which contained 100 tins of opium, and a small number, I think it was around 20 or 30 of these, Drew placed in a small straw case, similar to a small suitcase, and told me he was going to deliver it to the Chinaman on

Van Ness Avenue. He asked me to remain with the remainder of the stuff in the room until he returned. He was gone about 40 minutes I should judge and returned and took the rest of the stuff in a suitcase to his apartment. What he did with that I don't know. There was one more package delivered there, February 8th. That is the one for which I signed and was arrested.

Q. Will you just step down here and look at this container and see if you recognize any of these cans of smoking opium as the ones?

A. The case is similar to the two that were in the first shipment; there were two; I would not say that is the one, but it was similar. I saw the second shipment. It was in a box something like this.

Q. Will you look at this box and see if that looks like the box?

A. Yes.

I can identify that as the exact box only by the name that was on it when it was delivered and addressed. The box was wrapped in a paper. This paper is the one I signed for, the one I am talking about. I signed for the package at the entrance to the Ambassador Apartment, 948 Post street, took it upstairs to Apartment 19, and placed it in the cupboard as Drew advised me, locked it up and was keeping the keys for Drew, and as I started out of the apartment I met a custom officer so I went back inside up towards the roof and then I decided to go out on the street and was arrested after I got half a block away from the house. That is about all I know about this case.

[fol. 72] Cross-examination:

Upon cross-examination, the witness testified as follows:

I am now under arrest on the same charges, under bond of $1,000. I was not released on my own recognizance without any bond. There have been to my knowledge three separate indictments returned against me. As to one of the charges I pleaded guilty and received a sentence of one day. In another case my bond was reduced to $1,000 and I gave that bond.

Q. And in another case you were to be released on a bond of $1,000 and you never gave that bond, did you?

A. I never knew anything of it.

Q. You never knew anything about that charge?

A. I am out on $1,000.

Q. It was a $2,500 bond and you never gave the bond. You were released by Judge Kerrigan on your own recognizance?

A. I was not.

The transactions I have told about took from the Fall of 1922 to February 8, 1924. Around the latter part of October. Until February 8, 1924. These loads were spread apart, three or four of them were pretty close together in the central part of 1923, and I saw Drew perhaps three or four times during landing and handling each shipment. During that period on one occasion I saw the defendant and recognized him. On various other occasions I met Chinamen either in the company of Mr. Drew or alone, but I

could not recognize this defendant,—it would have been an impossibility, we were never within 100 yards of each other. On the occasion I did recognize the defendant he was in the rowboat with me for perhaps two hours and a half, in riding from China basin or the Santa Fe freight slip to pier 40 or 42. We were out after a load of opium on the President Taft. The plan was that I was to swim over under the slip down alongside the ship and obtain a line and bring it back to them in the boat. I did not swim out [fol. 73] there. Because there was no signal given on the ship that the line was out.

Q. I will ask you whether or not you did not testify before Commissioner Krull in the Post Office building in this city on June 10, 1924, at which time you said that on or about the 14th day of June, 1923, you were at pier 37 in the evening with the defendant Wong Tai and a couple of other people, that you were there for the purpose of swimming out from the pier to locate sacks containing opium that had been dropped from the Steamer Taft; that you were not employed by Wong, but that you were employed by a man who had been employed to do the swimming and was sick and that you refused to swim out for the line?

—. I did not. That is simply a hatched up verbiage of the whole thing.

Certain parts of that are true. The fact that we went to pier 37 is untrue; I was never near pier 37. In the first place the Pacific Mail does not land there. It lands on the other side of town at pier 42.

Q. Do you at this time recall anything else?

A. If you will ask the question again, I will answer.

Q. I will ask you whether or not it is not a fact that you did not swim out that night for the line because you refused to do so?

A. Because there was no signal given.

Q. Then it is not a fact as is stated that your reason for not swimming out was merely that you refused to do so?

A. There might have been something in that for this reason, that on the occasion previous to that on the steamer President Wilson, I was spotted in the water by a customs guard on the ship and got away by diving under and swimming back to the opposite pier.

Q. You say there might have been something in it. Will you explain a little more in detail, if possible, what you mean?

A. On this occasion I will admit I was not very anxious to make [fol. 74] the swim, but due to the fact there was no signal given it was not necessary to make the swim. If the opportunity had arisen I would have refused, on account of being spotted in the water on the trip previous to that.

Mr. McWilliams:

Q. Is it not a fact that when you testified before Commissioner Krull you said nothing whatsoever about the signal not being given?

A. I did say something about it.

Q. What did you say on that occasion on that subject?

A. That we remained there to the best of my knowledge waiting for the signal to be given until eleven o'clock, and that due to the fact that no signal was given we left.

Q. Is it not a fact that on that same occasion before Commissioner Krull you said nothing about being out in a boat for two and a half hours or any considerable period of time?

A. I certainly did.

That meeting with the defendant took place on or about June 13, 1923. I am positive of the ship that the shipment came on and by using the sailing schedule of the steamers for the year 1923, I fix that date as the approximate date, not absolutely. I first had occasion to fix that date subsequent to the trip itself after making my statement to the custom officials. That was some time in May, 1923; No, 1924; approximately a year subsequent. I then fix the date as June 13, 1923; not the absolute date; I was absolutely positive of the steamer and by looking at the sailing date I knew that we were working on a job within four nights after the ships arrived and one or two nights after departure. So that is the approximate time.

On that evening, Drew picked me up as usual at my home at 1461 Jones Street at that time, and in the car was the defendant. The defendant was in the front seat of the automobile with Drew. From there we drove down to the Depot Garage at Third and Townsend Sreets and from there we went to the China Basin; it took possibly [fol. 75] 20 to 25 minutes to go down to the garage. From there we went to China Basin, to the Santa Fe freight slip. That took approximately five or ten minutes. We went from there in a row boat to pier 42 or 44, opposite the President Taft. It took possibly an hour and three-quarters to get over there from China Basin and get under the dock the way we did. It was rather a dark night. There [fol. 76] was no moon that night. We were far enough out from the pier so that we would not be recognized,—but not at all times. After we rowed out to the President Taft, we laid there from approximately eight o'clock, eight or nine o'clock, until eleven. We were under the dock, right off the bow of the President Taft, I should judge from about eight or eight-thirty in the evening until eleven or eleven-thirty that night. Then we returned to China Basin slip, secured the boat and went back to the garage, got the car and went home. They dropped me somewhere, I don't remember just the time, but I believe it was at Powell street and they went on, supposedly to Chinatown. I was with them in the automobile from the time it took us to drive from the Depot Garage up around Powell street, somewhere around fifteen or twenty minutes it took us. On that trip the defendant was in the front seat with Drew. I would undertake to say that it was this particular Chinaman rather than some other Chinaman that was out there.

Q. Is it not a fact that you did not get a good look at the defendant during the whole of that evening by reason of the circumstances?

A. I stood face to face with the man for about five minutes and talked to him.

At the Depot garage the defendant and myself got out of the

car outside while Drew took the car inside. During that interval from the time that Drew was putting the car inside the defendant and I stood at the corner under a very bright arc light and talked. There was nothing wrong with the car so that it needed repairs. All Drew had to do was to take the car in and garage it. The only delay was the question involved of signing a tag, which would take possibly five minutes. He signed the storage tag which you sign in any garage in the city. That took, I would not say it was absolutely five minutes. But it was possibly around that time. The time I had a good look at the defendant was standing there and talking to him and facing him for about two hours and a half or three hours in a boat. During that time we passed two very bright arc [fol. 77] lights off the Santa Fe slip, which make it bright as day, and under the head of pier 44 there was an arc light flashed under the pier from the steamer which made it as light as day under there. We were right up at the end of the pier. I had many looks at the defendant. The other opportunities for those many looks were from being in the boat with him as we passed these four arc lighted places, and when we got out of the boat at the float, the Santa Fe has several arc lights up and down the dock there that we passed under, and there were several on the bridge, and there were several between the bridge and the garage, which makes it practically bright as day. As we went out, leaving the Santa Fe slip, it would be an impossibility to go far enough away to be unrecognized; as you go out pier 46 and the Santa Fe freight slips are not over 300 yards apart, and you have got to go between them. Then, going around the ends of 46, 44 and 42 you enter under the end of 40, we were possibly two or three hundred yards. But after getting under the pier where the Taft was lying it was very bright. We did our utmost to keep out of the range of those lights so that we could not be recognized. A man naturally would under those circumstances.

Q. Is it not a fact that after your arrest you went to the place of business of the defendant with one Jack Floyd, a policeman, and on that occasion you were absolutely unable to recognize this defendant as the man whom you had seen before?

A. I was not. I identified this man on that occasion.

I identified him from being in the boat with him and knowing him absolutely.

Q. Was it not a fact that you required assistance before you were able to identify him?

A. I did not.

Redirect examination:

[fol. 78] Upon re-direct examination, the witness testified as follows:

Mr. Riordan:

Q. You say that you had a conversation with Wong Tai near that garage where you put that machine?

A. Yes.

Q. What was that conversation about?
A. During the interval that we were waiting for Drew to come out of the garage we asked—the defendant asked me how long I had known Drew, and I told him——

Mr. McWilliams: I see no theory, if your Honor please, on which this is proper redirect examination. I went into the subject for the purpose of showing the opportunity for identifying the defendant.
The Court: The fact of the conversation, the length of it, the subject matter might tend to show how the witness seems to be sure of his identification; the conversation might aid there. Overruled.
Mr. McWilliams: Exception.

He asked me first how long I had known Drew, and I told him I thought about a year at that time, I don't recall exactly, and he was then telling me about the good points of Drew—the drift of the talk was the honesty of Drew and what a good boy he was.
I had no conversation with him about the drugs.

Recross-examination:

Upon re-cross examination, the witness testified as follows:

I had no difficulty in understanding him at all.
Q. As a matter of fact do you not know that it is practically impossible for him to speak English so that any normal person can understand him?
A. He talks some English very plain.

Testimony of Lillian Cube

Lillian Cube, a witness called on behalf of the United States, being first duly sworn, testified as follows:

[fol. 79] I am the sister of Ben Drew. I recall the incident that he testified to where some opium was brought into my house. My brother was living with me then. I recognize this defendant at the table there. When I first saw him he was in the house. That was just a few weeks before Christmas Day. It was after my brother brought the opium in the house that I saw him in the house. He walked up, my brother and I were in the front waiting for them to come, and he drove up in a machine, and three of them came into the house, and he walked into my brother's room. This defendant and two others. The three of them stayed in the room, so I told my brother to hurry up, to get the stuff out of the house. I did not want to get in trouble, and of course, the other fellows did not have much to say, this man did all the talking, so he brought some newspapers, I think, or some matting to wrap the stuff in, so I told them it was already wrapped up any way in newspapers and the defendant said the paper was not strong enough, that he wanted to wrap the

thing over again. Then they took the stuff out that night. I saw this defendant after that. I saw him at his place of business on Stockton Street. I went down there, I found out where he was from my brother, he told me he was on Stockton street, 1623, so I went there and the first night I found there were two little fellows in there, and I asked them for the tall man, and they said there was no tall man there. So I went back a second time, that was the second afternoon, so they called the tall man to come down, but it was a white man, so I ran out of the place, I thought it was a policeman, and on the third time I went down he was just coming down the steps, and I said that is the tall man I am looking for. So I walked up and spoke to him. I said, "Hello, Wong," and I told him I was Ben's sister. At first he didn't want to know me, so I kept on telling him I knew him, he had come to the house and gotten the stuff. So [fol. 80] finally he said to me, "Come on upstairs," and I walked upstairs with him into the sitting room, and I told him what I wanted, I wanted him to help me to get my brother Ben out of jail, I wanted to get bonds, and he said he was very sorry, he was arrested himself and was out on $10,000 bail, that he would see what he could do for me, he would come down to my place of business on Clay Street and see me in two or three days after that, but he never did come. At the store at that time, he said Ben was all right, Ben was a good boy but he did not think much of Marrah. He told me where the customs officer and Marrah had gone into the place and seen him, but he denied knowing Ben, and he wanted me to tell Ben not to know him, that if they asked him if he was the man for him to say that he was not the man, for him to say he did not know Ben and he would say he did not know him. He claimed that Marrah was the one that told the custom inspectors that he was the man.

Cross-examination:

Upon cross-examination, the witness testified as follows:

On that occasion, the defendant did not want to know me at first, and he told me afterwards to say to Ben that if the custom officers asked him, to say that he did not know him, and he would say he did not know Ben.

Q. And he also told you, did he not, that he did not know your brother?

A. Oh, no, he did not say that to me. He knew Ben. He told me to go back and tell Ben that when Ben was in jail if the customs officers asked him about him, for Ben to say that he did not know him and he would say the same thing about Ben, that he did not know him. He told me he would come around in two or three days, but he did not come around. My brother did not go to see him; he could not see him, he was in jail then. My brother did not go to see him after he got out of jail.

[fol. 81] Q. He also said, did he not, that he did not know your brother Ben and that it was another Chinaman who was mixed up in the trouble?

A. You mean he told me he did not know my brother Ben?

Q. Yes?
A. No, he told me he knew Ben, but he told me that he did not want the custom officers to know that he knew Ben.

TESTIMONY OF F. McNERON

F. McNERON, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I reside at 2330 Castro Street. I know the defendant, Wong Tai. I and Drew went up there once, on Jackson street, in 1922, between Christmas and New Year's day. I went inside of the store with Drew. I had no conversation with Wong Tai. Drew and the Chinaman talked over something, and I heard Drew tell the Chinaman he got nothing.

Cross-examination:

Upon cross-examination, the witness testified as follows:
That was in 1922, between Christmas and New Year's Day, the latter part of 1922. Besides this Chinaman, there was present Ben Drew and me and I think a little Chinaman. I don't know what that little Chinaman's name was. I know this man because he was a big man. He was the only one I noticed. I am not under indictment.

TESTIMONY OF EDWARD S. SKAHAN

EDWARD S. SKAHAN, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I reside at 1631 Broadway, San Francisco. I am a customs inspector in the employ of the United States customs. I have been such thirteen years and a couple of months. Along in the summer of 1923, I was on duty, I had charge of the night watch. I am called [fol. 82] the lieutenant of the watch. I was out on the bulkhead between pier 36 and 38 and I noticed a launch bobbing up and down there a steam launch. I was on this watch along about the 29th of June, 1923, in the nighttime. The watch commenced at seven o'clock on the 28th and winds up at seven o'clock on the 29th. At 11:15 I found a launch number 942 close by pier 38 and I jumped down to investigate the launch and I found an ex-customs officer in the wheelhouse and I looked in the after compartment of the launch and I found it empty. I went to the forward compartment and I found Wong Tai lying down there. I brought him out and asked him what they were doing there, took them into pier 36 where the Taiyo Maru was moored, turned them over to the gangway man, called up the assistant surveyor, Mr. Stone, and asked him what disposition I would make of the case. I turned them over to a Customs

Guard and I went to telephone. The vessel in which I found the defendant was a small launch, maybe 15 feet long with a six foot beam, a very small affair. The wheelhouse was about midships of the launch; it was covered. With reference to this wheelhouse I found this defendant forward. There is not very much room there. You could not stand up or you could not sit down. You could lie down by crawling in. It was covered, with a regular top cover of a hatch. That was at 12:15, at midnight.

Cross-examination:

Upon cross-examination, the witness testified as follows:

The name of the ex-customs officer who was in the wheelhouse was Daniel Swinehart. He is present here in court. I said to the defendant and Swinehart, "What are you doing here?" I think he said they were waiting for the operator, he went up on Third street to get a cup of coffee. I said, "We will wait awhile and see if he comes back," but he did not come. So then we went into 36 and I phoned to the assistant surveyor as to what disposition I would make respecting these two men. They investigated them to some extent. I [fol. 83] turned them loose on the assistant surveyor's orders. I was present at the investigation before the assistant Surveyor the next morning.

After I turned them loose, they appeared before the assistant surveyor next morning and were examined by him. I don't know whether anything was done. I did not discover any opium on that boat.

Redirect examination:

Upon redirect examination, the witness testified as follows:

Mr. Riordan:

Q. Did you discover anything else on this man?
A. Yes, I discovered a lot of grappling hooks there.
Q. Did you discover anything on his person?
A. Yes, I discovered in the top pocket——

Mr. Hatfield: I object to this as not proper redirect examination.

The Court: I don't know what it is. He did not go into it on the direct, but you opened up the subject of opium. Let us hear if there is anything indicating opium.

Mr. Hatfield: Exception.

I found a small piece of paper with a room number, the number of the room and the hotel and I think just simply "Ben" was written on the piece of paper. I did not bring that card. I turned it over to Captain Head. I don't know what has become of it.

Q. Did you find anything else.
A. Yes, he had $1,609 in currency.

When this man did not show up that they said they were waiting for, they did not give me any other reason why they were waiting there.

Recross-examination:

Upon recross- examination, the witness testified as follows:

It has been so long ago, I would not be positive that the name [fol. 84] "Ben" was on that card. I would not want to swear under oath exactly what was on that card that I took from his person.

TESTIMONY OF W. R. BOTKIN

W. R. BOTKIN, a witness called on behalf of the United States, being first duly sworn, testified as follows:

My occupation is customs inspector for the San Francisco district. I went down to an apartment of a man by the name of Elkins along about February, 1924.

Q. Will you step down and look at this box containing tins and a basket containing tins and state if you recognize them?

A. Yes. I identify them.

I got them at 948 Post Street, apartment 19. That apartment was under the name of J. E. Elkins.

Q. Did you see anybody there when you got that?

A. Mr. Marrah signed for it. I witnessed the signature.

TESTIMONY OF J. E. MARRACH

J. E. MARRACH, a witness recalled on behalf of the United States, testified as follows:

Q. I show you this express receipt and ask you if you identify that?

A. Yes, that is the one I signed for the package.

I signed that for Ben Drew. I got it from the express people.

Mr. Riordan: I offer this as Government Exhibit, the express receipt for a shipment with the date attached thereto.

(The article was here marked "U. S. Exhibit 1.")

I also offer the box together with the cans of opium as Government's Exhibit 2.

[fol. 85] (Government Exhibit 2 consists of one box and fifty 5-tael cans of unstamped prepared smoking opium. Each can is labeled "Lam Kee from Macao". On the box is a typewritten label of the American Express Company, with the following notation thereon; 'American Railway Express Company, Honolulu, January 29, 1924, No. 11833—From F. Elkins, Graystone Hotel, Honolulu; For J. E. Elkins, Apartment No. 19, New Ambassador Apartments, 948 Post Street, San Francisco, California.')"

Mr. Hatfield: I object to the admission of this, your Honor. I take it that it has not been connected up with the defendant, and I

move to strike this testimony and also the testimony of Agent Botkin, under the ruling this morning, that all of this has not been connected up in any way with the defendant.

[fol. 86] Mr. Riordan: You will give me a stipulation that that is smoking opium as alleged in the indictment?

Mr. Hatfield: I won't give you a stipulation because I don't know.

The Court: I think it may be said that there is evidence tending to show the conspiracy charge.

Mr. Hatfield: Yes, your Honor, but I do not understand that there is any evidence connecting the defendant with this opium here.

The Court: Here is an apartment rented by these people, Marrach and Drew, where these receipts of opium were had, to some extent; there were 100 tins in a shipment from Honolulu, and this followed along. I think there is sufficient evidence for it to go to the jury. The motion is denied.

Mr. Hatfield: Note an exception.

The Court: It may be noted.

Testimony of H. L. Alvez

H. L. Alvez, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I am the chemist of the United States Customs service.

Mr. Hatfield: I will stipulate that he is perfectly qualified to analyze it and tell what it is.

I have analyzed this particular opium in this basket and in this box. I found it to be prepared smoking opium. It is entirely prepared smoking opium. I use the term prepared smoking opium to distinguish it from gum opium. Prepared smoking opium is prepared from gum, it is an extract from gum opium, evaporated down to a syrupy consistency.

Q. Is there any certain amount of opiate, that is, does it run some percentage—I don't know just how you would describe it?

A. No, it is all prepared smoking opium. I would say 100 per cent.

[fol. 87] Cross-examination:

Upon cross-examination the witness testified as follows:

Q. Is it necessary to make an analysis of smoking opium to determine what it is?

A. I made it.

Q. I say, is it necessary?

A. I always make an analysis. Smoking opium resembles molasses in appearance.

Q. In the condition in the can it was necessary to make an analysis of it or to burn it or to do something with it in order to tell what it is?

A. It is necessary to make an analysis of it.

By just looking at it, I would not—I could not give a guess as to whether it was opium or not.

TESTIMONY OF W. R. BOTKIN (recalled)

W. R. BOTKIN, a witness recalled upon behalf of the United States testified as follows:

The opium that is in that box I got at 948 Post Street, Apartment 19. We had a search warrant for the place. I went in there. I witnessed the signature of the express bill and followed it up. These cans that are in this basket came out of the box. This box that is partially full. The balance is in the basket, just to make it easier to carry up here.

Cross-examination:

Upon cross-examination the witness testified as follows:

That box came from a Matson boat from Honolulu. F. Elkins showed as the shipper.

TESTIMONY OF D. G. SWINEHART

D. G. SWINEHART, called on behalf of the defendant, being first duty sworn, testified as follows:

I reside at 626 Powell Street. I know the defendant Wong Tai. I was with the defendant Wong Tai on a boat number 942 by pier 38, about June 28. I had made a previous engagement with a friend of [fol. 88] mine who owns the boat to make a fishing trip with him and later asked the defendant Wong Tai if he would like to accompany us. I have had some business dealings with Wong Tai and had discussed the fishing trip previous to this day. I had no business dealings in reference to opium. I had sold him dried fish and dried abalones and shrimp and things of that nature. He decided he would like to go with us and I had made a previous arrangement with the owner of the launch to meet him in the creek near the Third Street bridge about 9 o'clock on a certain night about the date mentioned, and I took Wong Tai down there and introduced him to the owner of the boat; he was having trouble with the engine at that time, but later fixed it up and we started for Fisherman's wharf, where we intended tying up for the night; on the way over the engine went bad again and we brought the boat against the bulk head between 35 and 38 where it was picked up by the customs. Wong Tai and myself were taken over to pier 36, and held there for a short time while the officer who picked the boat up telephoned to Mr.

Stone, and we were released and later the next day at ten o'clock appeared in the custom house and made a statement.

I never had any dealings with Wong Tai for grappling for or diving or swimming around a boat for the purpose of securing opium or anything else. My only dealings with Wong Tai were as I have mentioned.

Cross-examination:

Upon cross-examination the witness testified as follows:

I am an ex-customs officer. I am quite familiar with the bay around the water front. I had been on duty down that way when I was employed by the Government. On this occasion I was going fishing. I didn't say we were going fishing that night. We were going fishing the next morning. We were taking the boat over to Fisherman's wharf to tie up for the night. We were going early [fol. 89] the next morning on a fishing trip.

Q. You had no fishing equipment on the boat at that time?

A. I think the Government officer can testify as to what was found there; they searched the boat and took everything off. I know they found lots of fishing equipment aboard, yes.

Mr. Hatfield: We will need an interpreter for the defendant. Mr. Jones is not here.

Mr. Riordan: This defendant we think can talk English.

The Court: One of the witnesses said he had no difficulty in talking to him.

Mr. Hatfield: If your Honor is able to understand him, you will be doing better than I have done.

The Court: We will try it.

Testimony of Wong Tai

Wong Tai, the defendant, being first duly sworn, testified as follows:

The Court:

Q. How long have you been in this country?
A. Three years and one month.
Q. Come from China?
A. Come from Canada.
Q. How long were you in Canada?
A. Eight years.
Q. What did you do up there?
A. Jewelry store.
Q. In what place?
A. Columbia River.
Q. What town, Seattle?
A. Vancouver.

Q. Your customers were white people?
A. I had customers.
Q. You had customers who were white people that came into your shop?
A. Not many.

The Court: I think we will get along all right. Proceed and use simple language.

I do not know Ben Drew. I never saw him before. I heard you talk — Ben Drew; I just saw him here, that is all. I never had any business transactions with him in reference to opium.
[fol. 90] Q. Did you ever go to his sister's house, Mrs. Cube's house, the lady that testified here?
A. No.
Q. Did you ever see his sister?
A. No.
Q. Mrs. Cube, did you ever see her?
A. Which one?

The Court: Is she present in court?
Mr. Riordan: Yes.
The Court: Have her stand up.
Mr. Riordan: Stand up, Mrs. Cube.

Mr. Hatfield:

Q. You see her before?
A. No.
Q. You ever saw her before today?
A. No.

Mr. Hatfield: Your Honor, that is not in accordance with what this defendant has told me heretofore. I think that he does not understand me.

Q. Did this lady ever come to see you up at your store?
A. No.

The Court: Where is your store?

A. On Stockton street.
Q. Didn't she come there to see you?
A. I never saw her.

The Court: He understands all right. Go ahead.

Mr. Hatfield:

Q. Did some lady come to see you up on Stockton street about Drew?
A. No, I never see her.
Q. Did you see the witness Marrah?
A. No.
Q. Do you know who Marrah is, Mr. Marrah here?

A. I see him here, that's all.
Q. Did you see him before?
A. I no see him before.

The Court: I suppose you have got your client, Wong Tai.

Q. What is your name?
A. Wong Tai.

The Court: Lots of people look alike, and I was wondering if you had a substitute. I think he understands.

Mr. Hatfield: I have nothing to say except this, that I feel quite [fol. 91] embarrassed about the lady, because he told me about the lady and I wanted him to testify to that fact.

The Court: You may cross examine him; I will give you all leeway.

I think one time this lady came up to my store and asked me about Ben Drew. I don't know that lady. She asked for my cousin. My cousin gone to China. His name is Wong Ching. He is a little fellow. She say she come in and want to see my cousin, you see. She asked me for my cousin, where my cousin is, and I say, he is going to China. I heard her speak about her brother Ben Drew. She asked to tell my cousin to help lend money and I say I don't know anything about my cousin.

The Court: Lend money to whom?

A. I don't know. This lady asked for my cousin to lend some money.

She said she wanted money from my cousin, to lend to her. I don't know what she was going to use it for. She didn't tell me.

The Court: Where is the witness Drew?
Mr. Riordan: Here he is.

The Court:

Q. Did you ever see Mr. Drew before?
A. No.
Q. You didn't go riding in an auto with him? Did you ride in an automobile with him?
A. No.

The Court: I think the witness has understood all right.

Mr. Hatfield: I have no further witness. I have the papers here in those three cases to offer. I do not know whether the district attorney will stipulate to them.

Mr. Riordan: Which ones are they?

The Court: What are these, the indictments of the witnesses.

Mr. Riordan: Evidently, your Honor, I do not think it is necessary to put them in evidence. I think the fact is that they have [fol. 92] been all indicted in connection with this transaction.

Mr. Hatfield: Yes. The only thing is this, that I have made a diligent search or had a diligent search made of these records and

which disclosed that in one case Marrah is out on $1,000 bail and in the other case that he is out on his own recognizance.

The Court: Very well, that can be in the record.

Mr. Hatfield: In the other case it discloses that Drew was out on $1,000 bail and his bail was reduced from $15,000 to $10,000 and then to $1,000.

The Court: I think that is in the record.

Mr. Hatfield: And in the other case there is no reduction of bail but that he is out.

The Court: Which case is that?

Mr. Hatfield: That is in one of these two cases.

Mr. Riordan: The minute entry must show.

The Clerk: Yes, the record shows the bond of Drew was reduced to $10,000 and then on June 4, 1924 the bond of Drew was reduced to $1,000. On July 2, 1924 the bond was reduced to $1,000 as to Marrah, and July 8th a bond was filed.

The Court: Whatever is in the record counsel can appeal to in respect to these witnesses. Proceed with the argument.

MEMORANDUM RELATIVE TO TESTIMONY AND EVIDENCE

The foregoing contains a correct statement of all the testimony given in the case, and all evidence, documentary or oral, offered in the case.

[fol. 93] COURT'S INSTRUCTIONS TO JURY

Thereupon, after argument to the jury by counsel for the plaintiff, the Court instructed the jury as follows:

Gentlemen of the Jury, you have heard the evidence and the argument, and now, as usual, it is for the court to deliver to you the charge in respect to the law to guide you in your deliberations. The court is privileged to comment on the facts, even to express its opinion as to the credibility or truthfulness of witnesses, guilt or innocence of the defendant, which rarely does it do, but if it does, and insofar as it comments on the evidence especially it does not at all bind you to the court's opinion on the facts, for the court has neither the right nor the power nor the disposition to do so, but it is simply to aid you to reason out the case to a correct conclusion; remember you take the law from the court, and we equally remember that we take the determination of the facts from you, as illustrated by your verdict.

The defendant in this case is indicted for that in September, 1922, and for a continuing period thereafter he unlawfully conspired, combined, confederated and agreed with Ben Drew and other persons to the grand jurors unknown to violate and commit an offense against certain statutes of the United States, which relate to the

importation and dealing with imported opium after its arrival in the country. It goes on to say that the manner in which they conspired to violate these statutes was that they unlawfully agreed and confederated together that they would unlawfully, knowingly and feloniously receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain drugs, namely smoking opium. That is the conspiracy which the defendant is charged [fol. 94] with having engaged in, to receive unlawfully, buy, sell, and facilitate the transportation and concealment of certain opium after it had been imported into the country. He is not charged with importation, nor with the selling, but with a conspiracy to conceal, transport and facilitate the transportation in this country after its importation. Then the indictment goes on to recite what are termed overt acts, that is to say, things done to further the conspiracy, and it states that in December of that year and at sundry times thereafter the defendant and the said Ben Drew and the other persons did buy, conceal, receive and facilitate the transportation after importation of smoking opium on certain dates after it had been imported unlawfully and brought over on certain vessels named and the names of which have been stated to you in the evidence.

The law involved is a statute of the United States; it is not only a revenue law but one wherein the United States forbids the importation of smoking opium and of any opium save under certain conditions. Congress has power to do that. It is not like the mere buying and selling throughout the state, which we have had some reference to heretofore, but this is an importation into the country, and congress has full control of the commerce of the country and anything that is deleterious and injurious to the inhabitants of the country, like opium and other narcotics. Congress can forbid that they be imported at all; that is its lawful power, and it has done so here, save that it permits a certain amount of opium and narcotics, to be determined by a board consisting of the Secretary of the Treasury and two other high officers of the government, to be introduced for legitimate purposes, for medicines and the like.

The statute reads, it is unlawful to import or bring any narcotic drugs into the United States except that such amounts of crude [fol. 95] opium and coca leaves as the board, consisting of the Secretary of the Treasury and two or three others, finds to be necessary to provide for medical and legitimate uses only. It may be imported and brought into the United States, under such regulations as the board shall prescribe.

Then it goes on and this is the part that applies to the case of the defendant:

That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States—that is not what he is charged with, but it says unlawfully imports into the United States contrary to law—and any person who assists in receiving, concealing, buying, selling, or in any manner facilitating the transportation, concealment or sale of any such narcotic drug after being imported into the country, knowing the same to have been imported contrary

to law, such person shall upon conviction be fined such and such an amount of money or commitment for such and such a period of time.

That is the basis of the charge. That is the law the defendant is charged to have conspired to violate. He is not charged with violating that law directly, but conspiring to violate it, and that calls into action and operation another statute of the United States which provides that if two or more persons conspire, confederate together to violate any statute of the United States and do any single act to further that combination and conspiracy, they are guilty of another offense and they shall be punished as that law directs, provided they are found guilty by a jury; I think it is a fine of some $1,000 or more and imprisonment of not more than two years. Two years is the maximum. It might be less but not more. That is up to the discretion of the court, in case there is a conviction.

The defendant has pleaded not guilty and that makes and brings [fol. 96] into operation in his behalf the presumption of innocence. He is presumed to be innocent of this charge that is made against him, and that presumption demands that you shall acquit him unless from a review of the evidence you find that the presumption of innocence is overcome to a degree that persuades you he is guilty of the conspiracy charge beyond a reasonable doubt.

The court has defined reasonable doubt to you repeatedly, but this being a case of some importance, a felony charge, the court will admonish you in respect to it once more, that a reasonable doubt which demands the acquittal of the defendant is not any doubt that may appear after you have heard the evidence, not a suspicious feeling that he may be innocent or a mistake may be made; of no. No such thing as absolute proof in any criminal case in court is possible, so the law does not require absolute proof and positive proof of guilt, but only requires it to that high degree of probability which is characterized as beyond reasonable doubt. You may have doubt of the guilt of the defendant after a review of the evidence, but nevertheless it will be your duty to convict him unless your judgment approves the doubt as a reasonable one; to define a reasonable doubt, it simply means that if after a review of all of the evidence and circumstances you have not a persistent judgment that to a very high degree of probability he is guilty of the conspiracy as charged, you have a reasonable doubt and should acquit him, are bound to acquit him. On the other hand after that review if you have a persistent judgment that to a very high degree of probability the defendant is guilty of the charge, you have no reasonable doubt and are bound to convict him; and when I say bound, gentlemen, you understand what I mean, bound by your oaths of office, your conscience, your honor, your duty to your fellow man and organized society to discharge the duties of a jury faithfully, honestly and in accordance with your best judgment. [fol. 97]

The defendant is not required to prove his innocence. On the contrary the Government must prove him guilty. You might have doubt of the innocence of the defendant and then you would acquit

him unless you also had the persistency of judgment that he is guilty and has been proved guilty by the evidence beyond a reasonable doubt.

The credibility of witnesses is for you, as in any other case, and the weight to be given to their testimony, and to the circumstances is likewise for you. There is a direct conflict between the witnesses in this case, taking the defendant as a witness in his own behalf, as he is. The witnesses for the Government, Drew, Marrah, Mrs. Cube, the customs officer, all testify to facts which show an association and a combination between the defendant, Marrah, Drew, Dunlap, and unknown persons very likely, because it takes money to organize the machinery in this way to get this stuff in China and ship it here, tending to show that such a conspiracy existed. Now, the defendant, on the other hand, flatly denies that he knew any of these people until he saw them in court; he said that in respect to the sister as well as the others, although he finally receded from that and said he had seen the sister or one whom he thinks to be the sister down at his store on Stockton street at the time she said that she went there. There was some plea in the beginning, and you have a right to bear all that in mind, that he could not understand English, and ought to have an interpreter but the court interrogated him and established to its satisfaction that he was fairly conversant with the English language and understood and could answer intelligently, and I think he did, but again, it is for you. Now, whether he felt in a degree under embarrassment or confusion [fol. 98] that led him first to deny knowing any of these people and afterwards admitting that he knew the sister; that may be borne in mind by you in weighing the testimony. You will remember that two witnesses for the government are likewise under indictment for this same offense in this court, and they are here testifying in behalf of the government, waiving their right to stand silent, as they said they would do upon interrogation by the court and counsel; you have a right to bear that in mind, that they are charged, and if they have been honest in their testimony and have given the government the benefit of their testimony, they are to all intents and purposes to go free without any punishmnt whatever in the future; the Supreme Court has laid down that law; it was the law but they simply declared it. You understand that where there is a conspiracy it is much more difficulty to unearth and find the real parties than where individual offenses are committed; that is why a conspiracy is considered such a grave crime and the penalty high. When two or more persons enter into a conspiracy to commit a crime, very often the government has difficulty in getting proof, and it must try to secure the evidence of some one or more of them against the others, whom the government prefers to prosecute for its own reasons, and the government has a right to do it—when I speak of the government I mean organized society; it has found it necessary, for our protection, for the protection of society, that accomplices and some of the criminals in the commission of an act must be used and may honestly be used to make out a case against the others, but of course that does not mean that they are to be

brought in and testify falsely, or that the government agents have an understanding or are permitted to persuade them to testify falsely; no, not at all. It means that they are to testify truly, in hope of leniency, which will be theirs, when they could not be compelled to testify at all, all because of incriminating themselves. You [fol. 99] have to keep in mind, however, are these witnesses testifying for the government, being themselves criminals, believing that they will receive leniency only if they can fix guilt upon this defendant, and are they testifying falsely against this defendant thinking that thus only can they secure immunity from the charges against them,—a thing that some of these accessories and accomplices may on occasions do, though certainly the government never encourages them to do that; the welfare of society does not require that; and we have no reason to believe the agents of the government have done so in this case of in any other case. However, the examination of the defendant's counsel in the beginning proceeded somewhat upon that theory, and he was entitled to proceed fairly in the reasonable discretion of the court to develop that theory, and he was allowed to do it, so far as the court thought it was necessary to develop it, and, always viewing the testimony of accomplices with caution, as you will if you are not willing to, do not feel, that you ought to credit these accomplices in this case, that ends the case and the defendant probably would be entitled to an acquittal at your hands; I would say, yes, he would be. It is a matter for the judgment of the jury.

On the other hand in weighing the testimony of the defendant you will remember also that he is the defendant, a serious charge against him, and ask yourselves whether his self interest has caused him to depart from the truth, to protect himself, relieve himself from guilt, to create at least a reasonable doubt and secure an acquittal at your hands and escape the consequences of his crimes, if he did commit them.

Now as to the testimony. First, again, to define the conspiracy that is charged, it is not the actual doing of any certain act, but a conspiracy to do it, to receive, conceal and transport this unlawfully [fol. 100] imported opium. Taking the evidence of the government witnesses Drew and Marrah, there is no question about the opium being unlawfully imported; nothing can be imported into the country except it goes through the custom house and pays duty, and opium naturally could not be discharged out through port holes after the fashion you have heard described here and brought into the country without being brought in contrary to law, and smoking opium could not be imported under any circumstances, not even through the customshouse; the customshouse will not permit. Now in order to be a little more acquainted with the law, a conspiracy means a partnership in crime, a combination, a confederacy, an association of several persons to commit some offense against the law, and after they have thus agreed to do it, if they do any one act to carry out the agreement, that is the overt act which the law requires to complete the offense, the conspiracy has come into operation and

an offense against the law. It is not necessary, however, in proving a conspiracy that it shall be shown to you by an agreement in writing where articles of partnership were drawn up; of ho-, conspirators do not do that; nor need it be shown to you that they ever came together and said we will violate this law; no. If they have an understanding whether expressed in words or tacitly that they will do the thing that the law forbinds and do acts which go to make up a crome, that is sufficient to constitute a conspiracy.

You could hardly ever expect the accused, never could expect the accused, standing trial, to testify that he was involved in a conspiracy, and very seldom have we any of the conspriators, as the government assumes to have in this case, to testify that there was this conspiracy, agreement, confederation; very often it has to be proved by circumstances; and circumstances very often is better evidence than the testimony of witnesses, because it is an old maxim [fol. 101] of the law that witnesses may testify falsely, but circumstances may tend unerringly to the truth. In a conspiracy, it may be as Abraham Lincoln once argued to a jury, or in his debate with Douglass—I do not remember which—he went on to say that if you find John framing certain timbers in one place and James framing certain timbers in another place and George framing certain timbers in still another place, and they are all brought together and you find they make a complete complicated structure, you do not need any further proof that these man were all working from a comm-n design and plan; they may never, themselves, have met and laid it out, there might have been other parties that planned the work. These things do not happen to come, and you know by experience that these men acted from a common desgin to make the timbers a complete complicated structure. So, then, in a conspiracy, if you find that one man, for instance, in China, shipped the opium, another man on the boat put it out through the port hole, another man on shore dragging it in with grappling irons, another man on shore receiving it or going into a house and getting it, you do not need to be told that these men got together and had an agreement to do these things or had it in writing; you will infer right away these men were all working to a common end to get this opium into the country and conceal it and put it in the channels of trade contrary to the law, which forbids it coming in at all. However, in this case the Government does present to you the testimony of these witnesses. I do not need to go over it with you. Drew told you how he first made his arrangements with Dunlap, where Dunlap told him to report to the defendant in respect to the opium as it came ashore, how he reported failure to the defendant, and other Chinamen, how this defendant criticized him; one expression was, "You are rotten in your work", or something like that, when he failed. Drew said how [fol. 102] he met the defendant at Dreamland Rink and took the opium, he testified to using an auto that was said to be the defendant's; Drew told you where he got the machine at the garage, and said he asked for it as Wong's, and told you about receiving the shipment from Honolulu, when the complaint was that it was too much trouble to get it ashore out of the boat; how the shipment got through

the express office is something that passes my understanding; that would look as though it had been landed without the custom officers paying very much attention to it; but that is another thing. He also told how the defendant came out to his sister's house and got some, and his sister corroborated him in that she said she saw the defendant come there and get it, she was there, and then Marrah testified to his connection with Drew; I don't remember if he had anything to do with Dunlap; he testified that he and Drew met this defendant and delivered opium to him but Marrah could not identify the defendant in any of these meetings, he said they were 100 yards apart, as far as he was concerned he never got close enough to identify him, but he tells you of one night, which Drew also told you about, where they went out with a boat to get something from the steamer "Taft", Drew, and Marrah and the defendant, together, and you heard his testimony as to the opportunity that he had to know him; there are some people who say all Chinamen look alike, but I think that they have as many distinctions when you get to know them as perhaps our own race has, and Marrah says he was absolutely sure that the man out in the boat was this defendant. That, perhaps, is about all that Marrah knew about it, except that he did engage this apartment that Drew told about, at which the Honolulu shipment was received, and this other package which came and was received by him at the time he was arrested. Then the sister, Mrs. Cube, states this defendant came out to the house and got some of it, and how she went to the store when her brother was arrested, and [fol. 103] appealed to him to furnish bonds; he said that he would get bonds, and then told her to tell her brother to say that he did not know the defendant, and the defendant would say he did not know the brother. Then there is the testimony of the officer, Skahan, as to finding the defendant concealed in the launch along with this former customs officer, who testified for the defendant here; that is to say, the theory of the Government is that this defendant was concealed and hiding there for some guilty reason, not on a fishing trip, as the defendant's theory is, but he was concealed in the bow of this launch, where he must have been in a very close *palce*, and that he had a large sum of money on his person, and while the officers saw grappling hooks in the launch, there was nothing said about any fishing tackle. Opposed to that is the deefndant's denial that he had anything to do with it at all, though he does mention finally that the sister came down to his place to inquire about a cousin who had gone to China, a little fellow, he said; that the sister asked to have the cousin lend some money, but did not ask him for any money. The witness Swinehart is produced to account for the night where the defendant was in the bow of the launch, and he says that they were going fishing, had a launch to go fishing, he and the defendant together; he said they had business relations together. There is no reason on earth why a respectable white man and a respectable member of the Chinese race should not perhaps go fishing or engage in other recreation together; personally, I have known a good many very respectable Chinese, but we are bound to recognize it is not a common thing for them to associate together and go and

take their recreation very much together, and in weighing Swinehart's testimony, whether that was really a fishing trip, you may have that in mind in determining Swinehart's credibility.

Well, gentlemen of the Jury, that is the whole case so far as the evidence goes, it presents that conflict of evidence to the extent that [fol. 104] you perceive, and it is for you to determine the proof; if upn all of the evidence you believe the defendant is guilty of the conspiracy as charged, that he combined and confederated with Drew and others to receive opium that had been unlawfully imported, knowing it was unlawfully imported, and then he transported it and concealed it in this country, if you believe that beyond a reasonable doubt, you will find him guilty; if you do not believe that beyond a reasonable doubt, you will find him not guilty.

There is one more matter of the law I will mention, and that is this: Suppose that the defendant was engaged with Drew, Marrah, Dunlap and others in receiving and transporting this opium and concealing it like the witnesses for the Government say, did he know that it was unlawfully imported? You will a*k*s yourselves. Now, the law in respect to that is this: The law forbids that kind of opium to come into the country at all. We know it is not made here in this country, so any man who finds smoking opium in this country is bound to know and does know that it has been unlawfully imported; and then if he takes part in concealing it and transporting it, or receiving it and covering it up from the Government, then he is knowingly doing those things that the law forbids. The only understanding of the intent and knowledge that the law knows is the test of what a man's mentality is.

[fol. 105] VERDICT

Thereupon the jury retired to deliberate upon a verdict and subsequently returned into court and rendered a verdict of guilty.

ORDER DENYING MOTION IN ARREST OF JUDGMENT

Thereafter, the attorneys for the defendant presented to the Court a motion in arrest of judgment based upon the grounds set forth in the demurrer and amended demurrer of defendant to the indictment, all of which grounds and the exceptions to the ruling of the Court, overruling said demurrer and amended demurrer are conserved and set forth in the engrossed bill of exception to the order overruling defendant's amended demurrer to the indictment and in the engrossed bill of exceptions to orders denying motion for bill of particulars; which said motion in arrest of judgment was then and there denied, to which ruling the attorneys for the defendant then and there, duly and regularly excepted.

The above bill of exceptions contains all of the evidence, oral and documentary and all of the proceedings relating to the trial, judg-

ment and conviction and motion in arrest of judgment of said defendant.

STIPULATION RE BILL OF EXCEPTIONS

It is hereby stipulated and agreed, by and between the attorneys for the United States and for the Defendant that all exhibits introduced in evidence upon the trial of the above entitled cause and now in the custody of the clerk of the Court shall be deemed to be included as a part of the foregoing bill of exceptions with the same effect in all respects as if incorporated in said bill of exceptions.

It is hereby stipulated and agreed by and between the attorneys for the United States and the attorneys for the defendant that the proposed bill of exceptions of said defendant and the proposed amendments thereto of the United States have been correctly engrossed and have been presented in time, and as engrossed may be approved, allowed and settled by the Judge of the above entitled Court as correct in all respects, and that the same shall be made a [fol. 106] part of the record in said case and is hereby made the bill of exceptions therein and shall be, and is, the bill of exceptions upon the Writ of Error sued out herein.

San Francisco, California, March 23, 1925.

Frank J. Hennessy, Marshall B. Woodworth, Attorneys for Defendant. Sterling Carr, United States Attorney.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing bill of exceptions, duly proposed and agreed upon by the counsel for the respective parties is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein, as per the stipulation of the attorneys for the respective parties.

Dated this 24 day of March, 1925.

Bourquin, United States District Judge.

[File endorsement omitted.]

[fol. 107] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR

Your petitioner, Wong Tai, alias Wong Sue Jun, alias Wong Wai, defendant in the above entitled cause, brings this his petition for a writ of error to the District Court of the United States, in the South-

ern Division of the United States District Court, in and for the Northern District of California, First Division, and in that behalf your petitioner says:

That on the 26th day of February, 1925, there was made, given, rendered and entered in the above entitled court and cause a judgment against your petitioner wherein and whereby your petitioner, said Wong Tai, alias Wong Sue Jun, alias Wong Wai, was adjudged and sentenced to imprisonment for thirteen (13) months in the Federal Penitentiary at McNeil Island, and to pay a fine of One Thousand ($1,000) Dollars; and your petitioner says that he is advised by counsel, and he avers that there was and is manifest error in the records and proceedings had in said cause and in the making, giving, rendition and entry of such judgment and sentance, to the great injury and damage of your petitioner; all of which error will be more fully made to appear by an examination of the said record and by an examination of the bills of ex-[fol. 108] ceptions in said cause, and in the assignment of errors hereinafter set out, and to that end thereafter that said judgment, sentence and proceedings may be reviewed by the Supreme Court of the United States of America, your petitioner now prays that a writ of error may be directed and issued therefrom to the said District Court of the United States in the Southern Division, in and for the Northern District of California, First Division, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bills of exceptions, assignment of errors and all proceedings had in said cause; that the same may be removed into the Supreme Court of the United States, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioner.

And your petitioner now makes the assignment of errors, attached hereto, upon which he will rely and which will be made to appear by return of the said record in obedience to the said writ.

Wherefore, your petitioner prays the issuance of a writ as herein prayed, and prays that the assignment of errors annexed hereto may be considered as his assignment of errors upon the writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings and that said defendant be awarded a supersedeas upon said judgment and all necessary process, including bail.

Dated this 28th day of February, 1925.

George J. Hatfield, Attorney for Defendant.

[fol. 109] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 4, 1925

Now comes Wong Tai, alias Wong Sue Jun, alias Wong Wai, defendant in the above entitled cause and plaintiff in error herein, and makes and files the following assignment of error upon which he will rely in the prosecution of his writ of error in the above entitled cause.

I

That the Court erred in giving to the jury that portion of the charge of the Court given to the jury, which is as follows:

"There is one more matter of the law I will mention, and that is this: suppose that the defendant was engaged with Drew, Marrah, Dunlap and others in receiving and transporting this opium and concealing it like the witnesses for the government say, did he know that it was unlawfully imported, you will ask yourselves. Now the law in respect to that is this: the law forbids that kind of opium to come into the country at all; we know it is not made here in this country, so any man who finds smoking opium in this country is [fol. 110] bound to know and does know that it has been unlawfully imported; and then if he takes part in concealing it and transporting it or receiving it and covering it up from the government, then he is knowingly doing those things that the law forbids."

For that such is not a correct statement of the law. Petitioner contends that the portion of the Act of February 9, 1909, as amended, which provides that all smoking opium, or opium prepared for smoking, found within the United States shall be presumed to have been imported after April 1, 1909, and that the burden of proof shall be upon the defendant or accused to rebut such presumption, and that possession of such opium shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the Jury, is unconstitutional and void, as being violative of Article V of the Amendments to the Constitution of the United States of America. It violates Article V of the Amendments to the Constitution of the United States in that it (1) violates the presumption of innocence guaranteed by the "due process" clause in raising from the possession of smoking opium after July 1, 1913, the presumption that it was imported after April 1, 1909; and (2) tends to compel the defendant in a criminal case to be a witness against himself.

II

That the verdict of the jury is contrary to law in that there is no evidence in the case that the defendant ever received or concealed or transported or facilitated the transportation or concealment of

opium which said defendant knew had been imported into the United States contrary to law.

[fol. 111] III

That the verdict of the jury is contrary to law in that there is no evidence in the case that the opium received or concealed by, or the transportation or concealment of which was facilitated by the defendant, had been imported into the United States contrary to law.

IV

That the Court erred in overruling the defendant's amended demurrer to the indictment herein.

For that the said indictment did not and does not inform the defendant of the nature or cause of the accusation against him, and is in violation of and contrary to the provisions of Article VI of the Amendments to the Constitution of the United States, and of the right of defendant guaranteed by said constitutional provisions of said amendment to be informed of the nature and cause of the accusations.

V

That the Court erred in denying said defendant's motion for a bill of particulars.

For that said indictment does not inform defendant of the nature or of the cause of the accusations against him, which right is guaranteed to him by the provisions of Article VI of the Amendments to the Constitution of the United States of America.

VI

That the Court erred in admitting evidence of overt acts not charged in the indictment.

VII

That the Court erred in overruling the defendant's motion to strike out evidence of overt acts not charged in the indictment.

[fol. 112] VIII

That the Court erred in pronouncing sentence against the defendant.

Wherefore, this defendant and plaintiff in error prays that the judgment of said District Court may be reversed.

George J. Hatfield, Attorney for Defendant and Plaintiff in Error.

UNITED STATES OF AMERICA, ss:

SOUTHERN DIVISION OF THE U. S. DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION

I hereby certify that the foregoing assignments of error are made on behalf of the petitioner for a writ of error herein and are in my opinion well taken, and the same now constitute the assignments of error upon the writ prayed for.

George J. Hatfield, Attorney for Defendant and Plaintiff in Error.

[File endorsement omitted.]

[fo' 113] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed March 4 ,1925

The writ of error and the supersedeas therein prayed for by the defendant, Wong Tai, alias Wong Sue Jun, alias Wong Wai, pending the decision upon the writ of error are hereby allowed, and defendant Wong Tai, alias Wong Sue Jun, alias Wong Wai, is admitted to bail upon the writ of error in the Sum of Five Thousand ($5,000) Dollars, but conditioned for payment of the fine imposed as well as surrender of defendant.

The bond for costs upon the writ of error is hereby fixed at the sum of Five Hundred ($500) Dollars.

Dated this 4th day of March, 1925.

Bourquin, District Judge of the United States for the Northern District of California, First Division.

[File endorsement omitted.]

[fols. 114-116] BOND ON WRIT OF ERROR FOR $5,000—Approved and filed March 6, 1925; omitted in printing

---

[fols. 117 & 118] BOND FOR COSTS ON WRIT OF ERROR FOR $500—Approved and filed March 6, 1925; omitted in printing

[fol. 119] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF SERVICE OF APPEAL PAPERS—Filed March 14, 1925

UNITED STATES OF AMERICA, ss:

On this 14th day of March, in the year of our Lord One Thousand Nine hundred and Twenty-five, personally appeared before me Frank J. Hennessy, the subscriber, and makes oath that he delivered a true copy of the Citation on Writ of Error issued in this Court on the 4th day of March, 1925, and, also, a copy of the Writ of Error issued from this Court on the 4th day of March, 1925, both in the above entitled cause, to Thomas J. Sheridan, Assistant United States Attorney for the Northern District of California, at San Francisco, California, on the 13th day of March, 1925; that on the 13th day of March, 1925, he deposited in the United States Postoffice at San Francisco, postpaid, a sealed envelope containing a copy of the above mentioned Writ of Error and Citation on Writ of Error, issued out of said Court in said cause, addressed to the Attorney General of the United States, Washington, District of Columbia.

Frank J. Hennessy.

Subscribed and sworn to before me at San Francisco, California, this 14 day of March, 1925. C. W. Calbreath, Deputy Clerk U. S. District Court, Northern District of California. (Seal.)

[File endorsement omitted.]

[fol 120] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUBSTITUTION OF COUNSEL—Filed March 23, 1925

It is hereby stipulated that Marshall B. Woodworth and Frank J. Hennessy be substituted as the Attorneys of record for the above named defendant in the above entitled cause in the place and stead of George J. Hatfield.

Dated this 20th day of March, 1925.

Wong Tai, Defendant.

I consent to the foregoing Substitution of Attorneys.
Dated this 20th day of March, 1925.

George J. Hatfield.

I consent to the foregoing Substitution of Attorneys.
Dated this 20th day of March, 1925.
Frank J. Hennessy, Marshall B. Woodworth.

[File endorsement omitted.]

[fol. 121] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 120 pages, numbered from 1 to 120 inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of United States of America vs. Wong Tai, etc., No. 15559, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to the præcipe for transcript of record.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of fifty dollars and twenty cents ($50.20), and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error, Return to writ of error, and original citation on writ of error.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of March A. D., 1925.

Walter B. Maling, Clerk, by C. M. Taylor, Deputy Clerk.
(Seal of the U. S. District Court, Northern Dist. of California.)

[fol. 122] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed March 4, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Wong Tai, alias Wong Sue Jun, alias Wong Wai, Plaintiff in Error and United States of America, Defendant in Error, a manifest error hath happened, to the great damage of the said Wong Tai, alias Wong Sue Jun, alias Wong Wai, Plaintiff in Error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties, aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the City of Washington, District of Columbia, within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the [fol. 123] United States, the 4 day of March, in the year of our Lord one thousand nine hundred and twenty-five.

Walter B. Maling, Clerk of the United States District Court, Northern District of California, First Division, by C. M. Taylor, Deputy Clerk. (Seal of the U. S. District Court, Northern Dist. of California.)

Allowed by Bourquin, United States District Judge.

[fol. 124] [File endorsement omitted.]

[fol. 125] IN UNITED STATES DISTRICT COURT

RETURN TO WRIT OF ERROR

The Answer of the Judges of the United States District Court for the Northern District of California to the Within Writ of Error

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint- whereof mention is within made, with all things touching the same, to the United States Supreme Court, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 27th day of March, A. D., 1925, duly lodged in the case in this Court for the within named defendant in error.

By the Court:

Walter B. Maling, Clerk U. S. District Court, Northern Dist. of California, by C. M. Taylor, Deputy Clerk. (Seal of the U. S. District Court, Northern Dist. of California.)

[fol. 126] CITATION—In usual form; filed March 4, 1925; omitted in printing

Endorsed on cover: File No. 31,068. N. California D. C. U. S. Term No. 378. Wong Tai, alias Wong Sue Jun, alias Wong Wai, plaintiff in error, vs. The United States of America. Filed April 22nd, 1925. File No. 31,068.

No. [redacted] 79

In the Supreme Court of the United States

OCTOBER TERM, 1926.

WONG TAI,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

In Error to the District Court of the United States for the Northern District of California.

MARSHALL B. WOODWORTH,
Attorney for Plaintiff in Error.

FRANK J. HENNESSY,
Of Counsel.

Vredenburgh 22745

INDEX TO ARGUMENT.

Alphabetical Index of Authorities and Pages Where They Are Cited in This Brief.

No. 378.

In the Supreme Court of the United States

OCTOBER TERM, 1926.

WONG TAI,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

In Error to the District Court of the United States for the Northern District of California.

STATEMENT OF THE CASE.

The plaintiff in error was indicted and convicted of a violation of section 37 of the Criminal Code for conspiring to violate the Act of February 9, 1909, as amended by the Act of January 17, 1914, *as amended by the Act of May 26, 1922,* commonly known as the Jones-Miller Act, but officially designated by the *revisory Act of May 26, 1922* (c. 202, Sec. 4, 42 Stat. 598), as *"Narcotic Drugs Import and Export Act."*

In brief, he was indicted for conspiring "to unlawfully, wilfully, knowingly and feloniously receive, conceal, buy, sell, and facilitate the transportation and concealment after importation of certain narcotic drugs, to-wit, smoking opium, the said defendant well knowing

the said drugs to have been imported into the United States and into the jurisdiction of this country contrary to law." (R. 2.)

The plaintiff in error interposed an amended demurrer to the indictment, which was overruled and exception duly taken. (R. 4-6; Assignment of Error No. IV, R. 56.)

Thereafter, plaintiff in error filed a motion for a bill of particulars supported by his affidavit, which was also denied and exception taken. (R. 7-9, 16-19; Assignment of Error No. V, R. 56.)

A motion in arrest of judgment was made, denied and exception duly noted. (R. 52.)

The plaintiff in error was sentenced to imprisonment in the United States penitentiary at McNeil Island, State of Washington, for the period of thirteen months and to pay a fine of $1000.

On March 4, 1925 (prior to May 13, 1925, when the Act of Congress of February 13, 1925, amending certain sections of the Judicial Code and further defining the jurisdiction of the Circuit Court of Appeals and of the Supreme Court and for other purposes, went into effect), the United States District Judge who presided over the trial of the case allowed the plaintiff in error a writ of error direct to the Supreme Court for the purpose of raising certain constitutional questions.

The Assignments of Error are few in number and may be said to raise three principal questions: First—The unconstitutionality of the Jones-Miller Act *as amended by the Act of May 26, 1922,* for a conspiracy to violate *which* the plaintiff in error was convicted; second—Overruling the amended demurrer and motion for a bill of

particulars; and, third—An erroneous instruction to the jury as set out in Assignment of Error No. I. (R. 55.) See Assignments of Error in Transcript of Record, pp. 55-56.

ARGUMENT.

I.

Unconstitutionality of Act of May 26, 1922, 42 U. S. Stat. 596, amending Act of February 9, 1909, 35 U. S. Stat. 614, as amended January 17, 1914, 38 U. S. Stat. 275, known as the Jones-Miller Act.

(Amended Demurrer, R. 5-6; Motion for Bill of Particulars, R. 8; Assignments of Error, Nos. IV and V, R. 56; Act of February 26, 1919, amending sec. 269, Judicial Code [sec. 1246, Vol. I, 1919, U. S. Comp. St. p. 272].)

The constitutionality of the Jones-Miller Act, that is the Act of February 9, 1909, as amended by Act of January 17, 1914, was considered and upheld by the Supreme Court in the case of *Yee Hem* v. *United States,* 268 U. S. 178.

But it should be noted that the Supreme Court in the Yee Hem case considered *only* the Act of February 9, 1909, as amended by Act of January 17, 1914 (Comp. Stat., secs. 8801-8801a). *It did not consider* the latest act on the subject, and which we now assail, to-wit: The Act of February 9, 1909, as amended by Act of January 17, 1914, *and as amended and re-enacted by the Act of May 26, 1922* (February 9, 1909, c. 100, sec. 1, 35 Stat. 614, amended January 17, 1914, c. 9, 38 Stat. 275, and *Act of May 26, 1922, c. 202, sec. 1, 42 Stat. 596.*)

A comparison of the Act of February 9, 1909, as

amended by the Act of January 17, 1914, with the Act, now under consideration, of February 9, 1909, as amended by the Act of January 17, 1914, *as amended and re-enacted by the Act of May 26, 1922,* will disclose that they are totally different on important matters. For instance, the "Federal Narcotics Control Board" is created and given great power to make regulations governing the importation of narcotic drugs; legislation not to be found in the Act of February 9, 1909, or in the Act of January 17, 1914, which were the *only acts* being considered by this Court in the Yee Hem case.

In fact, the amendatory Act of May 26, 1922, is a revision and substitution for the Act of February 9, 1909, as amended by the Act of January 17, 1914. To designate the Act of May 26, 1922, as an amendatory act is confusing and erroneous, as it is really a revision and substitute for the previous Acts of February 9, 1909, and January 17, 1914, with important changes in certain respects.

> "Where a statute is revised, some parts of the original act being omitted, the parts which are omitted cannot be revived by construction; but are to be considered as annulled, provided it clearly appears to have been the intention of the legislature to cover the whole subject by the revision."
>
> 36 Cyc., 1080-81 and cases;
> *U. S.* v. *Bedgood,* 49 Fed. 54.

When a statute is revised and a provision contained in it is omitted in the new statute, the inference is that a change in the law was intended to be made.

> *Buck* v. *Spofford,* 31 Me. 34.

Therefore, entirely novel and different questions of

constitutionality are presented to this Court by virtue of the *amendatory Act of May 26, 1922,* Congressionally designated and cited as *"Narcotic Drugs Import and Export Act."*

Again, the attack in the Yee Hem case was limited to but two grounds. Says the Supreme Court in that case:

> "Sections 2 and 3 of the Act as amended (Comp. Stat., Secs. 8801-8801a) are challenged as unconstitutional, on the ground that they contravene the *due process of law* and the *compulsory self-incrimination clauses* of the Fifth Amendment of the Federal Constitution." (Italics ours.)

In the present case, counsel for plaintiff in error present for consideration not only a *new and different Act of Congress,* but *other, further and different grounds* against the constitutionality of the revisory Act of May 26, 1922, not raised or discussed in the case of *Yee Hem* v. *United States, supra,* viz.: That the Jones-Miller Act, as amended by the Act of May 26, 1922, is in conflict with article I, section 8, subdivisions 1 and 3 thereof, and article X of the amendments to the Constitution.

Article I of the Constitution, section 8, subdivisions 1 and 3, grants Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Article X of the amendments to the Constitution reserves to the States the police power relating to the health, safety or morals of its citizens and to everything relating to its domestic economy.

It is the contention of counsel for plaintiff in error that the Jones-Miller Act, that is, the revisory Act of

May 26, 1922, is unconstitutional in that it is, in effect, an invasion of the police power reserved to the States.

This grave question was referred to by the Supreme Court in the case of *United States* v. *Jin Fuey Moy,* 241 U. S. 394, where this Court used the following language:

> "The district judge considered that the act was a revenue act, and that the general words, 'any person,' must be confined to the class of persons with whom the act previously had been purporting to deal. The government, on the other hand, contends that this act was passed with two others in order to carry out the international opium convention (38 Stat. at L., 1929); that Congress gave it the appearance of a taxing measure in order to give it *a coating of constitutionality,* but that it really was a police measure that strained all the powers of the legislature, and that section 8 means all that it says, taking its words in their plain, literal sense."
>
> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but *also grave doubts upon that score. United States ex rel. Atty. Gen.* v. *Delaware & H. Co.,* 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527. If we could know judicially that no opium is produced in the United States, the difficulties in this case would be less; but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Section 1. Congress, at all events, contemplated production in the United States, and therefore the act must be construed on the hypothesis that it takes place. *If opium is produced in any of the States, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. United States* v. *De Witt,* 9 Wall. 41, 19 L. ed. 593." (Italics ours.)

The Supreme Court was considering, in the case of *United States* v. *Jin Fuey Moy,* the so-called Harrison

Anti-Narcotic Act, which purports to be *a revenue measure.*

The constitutionality of the Harrison Anti-Narcotic Act was assailed in the case of *United States* v. *Doremus,* 249 U. S. 86, on the ground that it was not a revenue measure but was an invasion of the police power reserved to the States.

United States v. *Doremus,* 246 Fed. 958.

This Honorable Court was sharply divided in that case, but nevertheless upheld the constitutionality of the Harrison Anti-Narcotic Act. The Honorable Chief Justice and three of his associates dissented from the majority opinion, the report of the case stating:

> "The Chief Justice dissents because he is of the opinion that the court below correctly held the act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States.
>
> "Mr. Justice McKenna and Mr. Justice Van Devanter and Mr. Justice McReynolds concur in this dissent."

This Court further accentuated this grave doubt of constitutionality in the recent case of *United States* v. *Daugherty,* 269 U. S. 360, wherein the Court again stated:

> "The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in *United States* v. *Doremus,* 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20;

> *Hill* v. *Wallace,* 259 U. S. 44, 67, and *Linder* v. *United States,* 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

Again, this Court observed, in *Linder* v. *United States,* 268 U. S. 5, 19:

> "The sharp division of the Court in this cause (*U. S.* v. *Doremus,* 249 U. S. 86), and the opinion in Jin Fuey Moy's case, clearly indicated that the statute must be strictly construed and not extended beyond the proper limits of a revenue measure."

Both, the so-called Harrison Anti-Narcotic Act and the Jones-Miller Act, purport to deal with narcotics. The Harrison Act, with its "coating of constitutionality," given it under the guise of a *revenue measure,* has thus far been held to be constitutional by a divided court. But the Jones-Miller Act has *no real revenue "coating of constitutionality."* It forbids the importation of narcotic drugs, save under certain conditions, that is, it permits a certain amount of opium and narcotics, to be determined by a board consisting of the Secretary of the Treasury and two other high officers of the government, to be imported for legitimate purposes, for medicines and the like.

> "The statute reads, it is unlawful to import or bring any narcotic drugs into the United States except that such amounts of crude opium and coca leaves as the board, consisting of the Secretary of the Treasury and two or three others, finds to be necessary to provide for medical and legitimate uses only. It may be imported and brought into the United States under such regulations as the board shall prescribe.
>
> "Then it goes on and this is the part that applies to the case of the defendant (plaintiff in error):

> "That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States—that is not what he is charged with, but it says unlawfully imports into the United States contrary to law—and any person who assists in receiving, concealing, buying, selling, or in any manner facilitating the transportation, concealment or sale of any such narcotic drug after being imported into the country, knowing the same to have been imported contrary to law, such person shall upon conviction be fined such and such an amount of money or commitment for such and such a period of time." (Charge of District Judge, R. 46-47.)

While the Jones-Miller Act does not purport to be a revenue measure, it does provide:

> "All narcotic drugs imported under such regulations shall be subject to the duties which are now or which may hereafter be imposed upon such drugs when imported."

Congress has also seen fit, under the Act of January 17, 1914 (38 Stat., 277, 278; Comp. Stat., 6287a to 6287f), to impose a tax of $300 per pound on opium manufactured for smoking purposes and has permitted the manufacture of smoking opium under bond by citizens in the United States and authorizing the same, creating and permitting a legitimate manufacture and use of smoking opium in the United States. This latter statute, of course, is designed to apply to domestic opium.

Congress, therefore, in its legislation has recognized that domestic opium and narcotics can be, and are, manufactured and produced in the United States. As said by this Court in the case of *United States* v. *Jin Fuey Moy, supra:*

> *"If opium is produced in any of the States, ob-*

viously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime."

Citing

United States v. *De Witt*, 9 Wall. 41, 19 L. Ed. 593.

It is contended that the seizure and forfeiture to the United States of smoking opium or opium prepared for smoking, imported or brought into the United States, on which no revenue is or could be levied, under said Jones-Miller Act, and the combining of said seizure and forfeiture under one provision of said act, with other provisions of said act delegating to the "Federal Narcotic Control Board" the power to determine what are *legitimate and medical uses* of narcotic drugs, is not the exercise of the power of Congress to regulate commerce with foreign nations, nor to provide revenue, but is a police power reserved to the States, and that, therefore, said Jones-Miller Act as it now stands, after its revision by the Act of May 26, 1922, is unconstitutional and void.

Furthermore, said Jones-Miller Act—the Act of May 26, 1922—is void for uncertainty, in that it fails to define what are *legitimate or medical uses* of crude opium, or to define any standard of difference between crude opium and the preparations thereof, permitted for the manufacture of opium for smoking purposes.

How can one know what he is violating under such ambiguous and uncertain language? What is it that is "contrary to law" under subdivision (c) of section 1 of the Act of May 26, 1922?

The question is as to the power of Congress under the

Constitution, article I, section 8, subdivisions 1 and 3, granting Congress the power to regulate commerce with foreign nations, to impose the penalty prescribed in said act.

The Jones-Miller Act—that is, the Act of May 26, 1922—shows on its face that the purpose of said act is to exclude narcotic drugs from importation, absolutely, into the United States. No attempt is made under said act to regulate commerce with foreign nations. Said act is not claimed to have been passed in aid of any foreign treaty. If the act cannot be sustained under the power to regulate commerce, it cannot be sustained at all. The power to regulate commerce is defined in the leading case of *Gibbons* v. *Ogden*, 9 Wheat. 1 (6 L. Ed. 23), at page 70:

> "What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."

But the power *to regulate commerce* does not include the arbitrary power *to prohibit all commerce.* Commerce cannot be regulated where there is none to regulate. The Supreme Court, in *Gibbons* v. *Ogden, supra,* held, on a point against an asserted State right to prohibit commerce within its territorial waters, of vessels not registered in that State, that the regulation of commerce was to promote commerce and not to prohibit.

No question is involved in the case at bar, under the conviction of plaintiff in error, as to any violation of a tax or revenue act, *there being none.*

The exercise, by the power of Congress, of a police supervision as to the morals of the country, does not create the power for the suppression and prohibition of

narcotic drugs, which is a power reserved solely to the States. As was well said by the Supreme Court, in *Linder* v. *United States,* 268 U. S. 5:

> "Federal power is delegated, and its prescribed limits must not be transcended even though the end seems desirable."

The Jones-Miller Act—that is, the Act of May 26, 1922—shows that it is an attempt to usurp the police power of the State, a power not delegated to Congress by the Constitution. It does not purport to regulate commerce with any foreign nation. It is an absolute prohibition by Congress, with no foreign nation taken into consideration at all, as to smoking opium.

Peet v. *Morgan,* 19 Wall. (86 U. S.) 581.

This act, assailed, relates solely to narcotic drugs. It delegates powers to administrative officers to ascertain what amount of said drugs the said board finds to be necessary to provide for medical and legitimate uses only, and to prescribe regulations thereunder, flexible and arbitrary, and without due process of law, and without any method of appeal or review of such finding as to said drugs necessary to provide for medical and legitimate uses only, and without any legal standard enacted as to what are medical or legitimate uses.

It is difficult to understand how the constitutionality of the Act of May 26, 1922, can be sustained, in view of the reasoning and doctrine approved in such cases as *Hammer* v. *Dagenhart,* 247 U. S. 251; *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44, and *Linder* v. *United States,* 268 U. S. 5.

In *Hammer* v. *Dagenhart,* 247 U. S. 251, Congress

enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children, etc., and this Court said, in holding that act to be unconstitutional:

> "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely State authority."

And the language used by this Court in approving of the doctrine and reasoning laid down in the case of *Hammer* v. *Dagenhart, supra,* is, we submit, applicable to the Act of May 26, 1922. The analogy of the Dagenhart and Child Labor Tax and other cases to be referred to is clear. Says this Court in the Child Labor Tax case, *supra:*

> "The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commmodities, unobjectionable as subjects of transportation, and to deny the same to the people of a State in order to coerce them into compliance with Congress' regulation of State concerns, the Court said this was not in fact regulation of interstate commerce, but rather that of State concerns, and invalid. So here the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State government under the Federal Constitution."

So, in the case at bar, the Jones-Miller Act—the Act of May 26, 1922—by absolutely prohibiting foreign

commerce in narcotic drugs, invades and interferes with the police power of the States.

In *Child Labor Tax Case,* 259 U. S. 20, this Court held that the Child Labor Tax Law, which was designed to regulate child labor, and not to collect revenue, as was manifest from its provisions, could not be sustained as valid exercise of the taxing power under the Constitution, article I, section 8, merely because what was in substance a penalty for violation of the regulations was designated as a tax.

In an exhaustive and able opinion this Court stated:

> "This case requires, as did the Dagenhart case, the application of the principle announced by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 423 (4 L. ed. 579), in a much-quoted passage: 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.'"

In *Hill* v. *Wallace,* 259 U. S. 44, this Court held that an Act of Congress which was manifestly intended to regulate a business cannot be sustained as an exercise of taxing power conferred on Congress by the Constitution, article I, section 8, merely because it sought to compel obedience thereto by imposing a prohibitory tax on those who violated the regulation.

So, in the case at bar, the Act of May 26, 1922—the Jones-Miller Act—is unconstitutional for the reason that enforcement of said act depends upon regulations by

administrative officers, styled "Federal Narcotics Control Board." That said act does not define what narcotic drugs may be imported except as the "Federal Narcotics Control Board" finds to be necessary to provide for medical and legitimate uses only, and/or what is the standard fixed by law for medical and legitimate uses only within the power of Congress to enact and within the power not reserved to the State. That said act does not define, and no Court *can* define thereunder, what is "*contrary to law*" under paragraph (c) of section 1 of the Act of May 26, 1922, or what, if any, regulations Congress had in mind when said act was enacted, or what legal standard was *intended* for said penalties prescribed in said paragraph (c) of section 1 of said act, and said provisions are a delegation of the police power reserved to the States, and said act is, therefore, unconstitutional and void.

The case of *Linder* v. *United States,* 268 U. S. 5, which involves a consideration of the Harrison Anti-Narcotic Act, is also in point, and it was there held that the direct control of the practice of medicine in the States is beyond the power of the Federal Government, and incidental regulation of such practice by Congress through a taxing act cannot extend to matters inappropriate and unnecessary to reasonable enforcement.

So, in the case at bar, Congress, under the guise of regulating commerce, cannot absolutely prohibit such commerce, and, in one breath, declare it to be "unlawful *to import or bring any narcotic drugs into the United States,*" and, in the next breath, provide "that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legiti-

mate uses only, *may be imported and brought into the United States* or such territory under such regulations as the board shall prescribe," and provide further "that all narcotic drugs *imported under such regulations* shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported."

Such legislation directly interferes with the police power reserved to the States, which power has never been delegated to the United States, and it is for the States to provide such legislation as they may deem proper in inhibiting or regulating within the State the sale, importation, production and use of narcotics.

Whether or not the citizens and residents of a State shall be permitted to smoke opium, or to use narcotics, or cigarettes, or snuff, or cubebs, is, obviously, a question solely of police power of the particular State, especially reserved to the States. It is no concern whatever of the Federal Government. Congress has recognized, by its legislation, and it is a matter of common knowledge, that opium, tobacco and narcotics can be, and actually are, produced and manufactured within the States and are used for legitimate and medical purposes. Congress has no power, however desirable the end to achieve, under the guise of regulating commerce or as a revenue measure, to stop interstate and foreign commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation and highly desirable for medical and legitimate purposes, and to deny the same to people of a State in order to coerce them into compliance with Congress' regulation of State concerns. While it may regulate commerce and may tax within its well-established constitutional limitations ar-

ticles of interstate and foreign commerce, it cannot *absolutely prohibit* interstate or foreign commerce in ordinary and necessary commodities used by the citizens and residents of a State.

For example, will it be contended for a moment that, were it not for the adoption of the Eighteenth Amendment to the Constitution, Congress would have had the right, whether under the guise of regulating commerce or as a revenue measure, *absolutely to prohibit* the importation from, or exportation to, foreign countries, or in interstate commerce, of intoxicating liquors?

The question answers itself. It was for this very reason, a question of police power reserved to the States, that rendered the adoption of the Eighteenth Amendment constitutionally necessary. When the United States adopts a constitutional amendment, as it did the Eighteenth Amendment, abolishing all traffic in and importation of narcotics, and delegating to the Federal Government the sole and exclusive right to legislate as to the importation, production and use of narcotics within the States, then, and then only, will acts of Congress like the Act of May 26, 1922—the Jones-Miller Act—and the Harrison Anti-Narcotic Act be constitutional enactments.

The suppression, the punishment for illicit traffic in narcotics, the regulation of their use, the importation or exportation to and from the States, is a matter solely relating to the health and the morals and the police power of the States and Congress is impotent to legislate so as to prohibit absolutely the importation of narcotics, whether it seeks to do so under the guise of regulating commerce or as a revenue measure, or both.

We trust that we have made our contention clear to this Honorable Court. The question is a most grave and important one. However desirable it may be to suppress the illicit use of narcotics, in which we thoroughly agree, yet, as was well said by this Court in *Linder* v. *United States, supra:*

> "Federal power is delegated, and its prescribed limits must not be transcended even though the end seems desirable."

As we pointed out at the outset of our argument, as to the unconstitutionality of the Jones-Miller Act, that this Court, in the case of *Yee Hem* v. *United States, supra,* neither considered nor discussed the grounds of unconstitutionality which we now urge. As stated by this Court in that case:

> "The question presented is whether Congress has power to enact the provisions in respect of the presumptions arising from the unexplained possession of such opium and from its presence in this country after the time fixed by the statute."

In fact, this Court did not then have under consideration, nor, as far as we are advised, has it ever considered, the Jones-Miller Act *as amended by the Act of May 26, 1922.*

The creation of the "Federal Narcotics Control Board" was first made by the Act of May 26, 1922, and the provisions of that act in that regard are so uncertain as to be unconstitutional and void. Said act is void for uncertainty as to what findings of said Board as to the amounts of said drugs are necessary to provide for medical and legitimate uses only. There is no standard by which any court can review such finding and such power

is legislative and not administrative where the violation thereof is subject to penalty.

> *Connally* v. *General Construction Co.*, 46 Sup. Ct. Rep. 127.

Said power to make what is "contrary to law" is restricted to Congress by the Constitution and may not be delegated. For the same reasons the term "contrary to law" in said subdivision (c) of section 1 of the Act of May 26, 1922, is void for uncertainty, as without authority in said Board and without standard in law as established by Congress. In support of this point see Cooley's Constitutional Limitations, 7th Ed., p. 163, as to delegating legislative power. These powers are by the Constitution restricted to Congress and the legislative body, and may not be delegated to administrative officers.

> Locke on Civil Government, Sec. 142;
> *The Aurora* v. *The United States*, 7 Cranch. 582;
> *Ex parte Wall*, 48 Cal. 279, 313, 315;
> *Barto* v. *Himrod*, 8 N. Y. 483.

The Act of January 17, 1914, chapter 10, 38 Stats. 277, levying and collecting a tax of $300 per pound on opium manufactured for smoking, and permitting the manufacture of said smoking opium under bond of $100,000 or more by citizens in the United States, and authorizing the same, is still in full force and effect, and creates a legitimate use for said narcotic drug, exclusive of the provisions of section (b) of said Act of May 26, 1922, 42 Stats. 596, and assumes opium to be manufactured in the United States, expressly allowing its manufacture into smoking opium under said Act of January 17, 1914,

38 Stats. 277, from gum opium or the residue of smoked or partially smoked opium, which may, or may not, be imported under that law when used for a legitimate purpose. And such purpose could not be more legitimate than that licensed by the Government at $300 per pound in accordance with said last-named act (Stats. 38, p. 277).

Keeping in mind the terms of the statute just referred to and also what this Honorable Court declared in the case of *United States* v. *Jin Fuey Moy, supra,* when it said:

> "If we could know judicially that no opium is produced in the United States, the difficulties in this case would be less; but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Section 1. Congress at all events, contemplated production in the United States, and therefore the act must be construed on the hypothesis that it takes place. *If opium is produced in any of the States, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. United States* v. *De Witt,* 9 Wall. 41, 19 L. Ed. 593," (Italics ours.)

we earnestly contend that the Jones-Miller Act, as amended by the Act of May 26, 1922, is a palpable invasion of the police power of the States; nor can it be sustained under the guise of being a law to regulate commerce with foreign nations and it is, and should be, declared by this Honorable Court to be unconstitutional and void.

II.

Trial Court Erred in Overruling Amended Demurrer and in Denying Motion for Bill of Particulars.

(VI Amendment to Constitution violated; Assignments of Error IV, V; R. 56; Amended Demurrer, R. 4-6; 13-16; Motion for Bill of Particulars, R. 7-9; 16-19.)

The allegations contained in the indictment, purporting to charge a conspiracy, are violative of the provisions of the Sixth Amendment to the Constitution of the United States in that they fail to inform the defendant of the nature and cause of the accusation against him. The statement of the alleged conspiracy is, also, so vague and indefinite that the defendant would be unable to plead jeopardy in bar of a later prosecution for the same offense.

The indictment charges that the defendant, Wong Tai, on or about September 10, 1922, at the City and County of San Francisco, State of California, conspired with one Ben Drew and with divers other persons to the grand jurors unknown, to commit the acts made crimes and offenses by the laws of the United States, to-wit, the Act of February 9, 1909, as amended January 17, 1914, and as amended May 26, 1922, that is to say, that the defendant did, at the time and place aforesaid,

> *"Knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree with one Ben Drew and with divers other persons to the grand jurors, aforesaid, unknown, to unlawfully, wilfully, knowingly and feloniously receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain narcotic drugs, to-wit, smoking opium, the said defendant well knowing the said drugs to have been imported into*

the United States and into the jurisdiction of this Court contrary to law." (R. 2, 2-4.)

This is the charging part of the conspiracy. This is *all* that the lower Court *had before it, or could consider,* in determining whether the indictment stated an offense and sufficiently apprised the defendant of the nature and cause of the accusation against him, "in order that he may meet the accusation, and prepare for his trial, and that after judgment, he may be able to plead the record and judgment in bar of a further prosecution for the same offense."

Bartell v. *United States,* 227 U. S. 430;
Lynch v. *United States* (C. C. A., 8th Cir.), 10 Fed. (2d) 947.

The indictment then proceeds to set forth certain overt acts done in furtherance of said conspiracy and to effect and accomplish the object thereof. Of course, it is elementary and well-settled law that:

"A conspiracy *must be found in the clause of the indictment which sets it forth, and cannot be enlarged by the overt acts alleged."*

United States v. *Britton,* 108 U. S. 199, 205, 27 L. Ed. 703;
Joplin Mercantile Co. v. *United States,* 236 U. S. 531, 535, 59 L. Ed. 705;
Zoline's Fed. Cr. & Proc., sec. 1039, vol. 2, p. 318.

"The insufficiency of the indictment as to the description of the offense *cannot be aided by averments of acts done in furtherance of the object of the conspiracy."*

Pettibone v. *United States,* 148 U. S. 197, 37 L. Ed. 419;
United States v. *Taffe,* 86 Fed. 113;
Zoline's Fed. Cr. & Proc., sec. 1039, vol. 2, p. 318.

"The conspiracy must be sufficiently charged, *and it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.*"

United States v. *Britton,* 108 U. S. 199, 204, 27 L. Ed. 703;
Conrad v. *United States,* 27 L. Ed. 703;
Zoline's Fed. Cr. & Proc., *supra.*

"*It is not sufficient to set forth the offense in the words of the statute* unless the accused is thereby apprised with reasonable certainty of the nature of the accusation against him, so that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense."

United States v. *Britton,* 107 U. S. 655, 27 L. Ed. 520;
In re Benson, 58 Fed. 962;
Lynch v. *United States,* (C. C. A., 8th Cir.) 10 F. (2d) 947;
Zoline's Fed. Cr. & Proc., *supra.*

It is further well settled that on demurrer and in moving for a bill of particulars a defendant is constantly clothed with the presumption of innocence. This rule is very clearly and ably stated by Circuit Judge Sanborn in *Lynch* v. *United States* (C. C. A., 8th Cir.), a recent case, as follows:

"The defendant in a criminal case, in view of his presumed innocence, is not only entitled to know from the statements of the indictment what facts the prosecution considers sufficient to make him guilty of the offense charged, with reasonable particularity, so that he may procure witnesses and make proper defense thereto, but he is also entitled to demand that the indictment charge the essential facts so specifically that the judgment rendered will be a complete defense to a second prosecution for

the same offense. (*United States* v. *Hess,* 124 U. S. 483, 8 S. Ct. 571, 31 L. Ed. 516; *Armour Packing Co.* v. *United States,* 153 F. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400; *Floren* v. *United States,* 186 F. 961, 108 C. C. A. 577.) In the light of the decisions referred to and the foregoing observations, does the indictment meet the legal test? Does it set forth the facts, which the pleader claimed constituted the offense in this case, so distinctly as to apprise the defendant of the charge he had to meet, and so completely as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense?

"The consideration and answering of these questions must be made under and in accordance with these established rules and principles:

"First. Where one is indicted for a serious offense the legal presumption is that he is not guilty; that he is ignorant of the supposed facts upon which the charge is founded. A demurrer to the indictment must be considered and determined on that presumption, on the presumption that the defendant does not know the facts that the prosecutor thinks make him guilty, and that he is unable to procure and present the evidence in his defense and is deprived of all reasonable opportunity to defend unless the indictment clearly disclose the earmarks, the circumstances and facts surrounding the case of the alleged offense, so that the defendant can identify, procure witnesses and make defense to it. (*Fontana* v. *United States,* [C. C. A.] 262 F. 283, 287; *Miller* v. *United States,* 133 F. 337, 341, 66 C. C. A. 399.)

"Second. The time of the alleged offense stated in the indictment in this case, December 7, 1922, gives the defendant no notice or information that enables him to prepare his defense and in no way identifies the occasion referred to, because under that averment the prosecutor is privileged to prove the alleged offense, in this case the defendant's possession of the whisky, at any time within three years prior to the filing of the indictment, which consti-

tuted the time before the statute of limitations ran. (*Winters* v. *United States,* 201 F. 845, 847, 120 C. C. A. 175; *Carpenter* v. *United States,* [C. C. A.] 1 F. [2d] 314.)

"Third. In determining the question whether or not the indictment set forth the facts which the prosecutor claimed constituted the offense so particularly as to enable the defendant to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, the indictment and the judgment alone can be considered. The evidence cannot be considered, because the evidence does not become a part of the judgment. (*Fontana* v. *United States,* [C. C. A.] 262 F. 283, 286; *Floren* v. *United States,* 186 F. 961, 962, 964, 108 C. C. A. 577; *Winters* v. *United States,* 201 F. 845, 848, 120 C. C. A. 175.") * * *

"Were a subsequent prosecution brought for the same offense a judgment of conviction or acquittal under this indictment would avail the defendant nothing. The identity of the offenses would be a matter of conjecture. The indictment and judgment in this case if offered in a subsequent trial for the same offense would fit many different occasions. There would be nothing to show that the alleged offenses were identical. We are satisfied the motion to quash the indictment should have been sustained, and that the failure so to do was serious and prejudicial error."

The defendant filed an amended demurrer to the indictment and among the grounds of demurrer assigned the following:

"I. That said indictment is vague and indefinite and does not set forth sufficient facts to enable the defendant to properly assert his defense.

IV. That there is no sufficient allegation or showing of commencement or object of alleged conspiracy.

V. That the attempted statement of facts seeking to show commission of an overt act or overt acts are, and each of them is, vague, indefinite and uncertain in failing to show:

1st. At what time or times, from what person or persons, at what place or places, and under what circumstances, if at all, this defendant *received* any opium or sack or sacks containing tins of opium.

2nd. At what time or times, at what place or places and under what circumstances, if at all, this defendant *concealed* opium or a sack or sacks containing tins of opium.

3rd. At what time or times, of what person or persons and at what place or places this defendant, if at all, *bought* opium or sack or sacks containing tins of opium.

4th. To what person or persons, at what place or places, at what time or times, and under what circumstances, if at all, this defendant *sold* any opium or any sack or sacks containing tins of opium.

5th. Where and at what time or times and between what places and in what manner and under what circumstances, if at all, this defendant *transported or facilitated* the transportation of any opium or of any sack or sacks containing tins of opium.

VII. That the said indictment and the allegations thereof, particularly the allegations in respect to purported commission of overt acts which said indictment seeks to allege, are so vague, indefinite and uncertain as to fail to inform this defendant of the nature or the cause of the accusation against him, or in what manner he has violated the law pertaining to a conspiracy to receive, conceal, buy, sell or facilitate the transportation or concealment after importation of narcotic drugs, or any other law, or to exhibit to him such facts from which he may ascertain the nature of the charges against him, or to enable him to avail himself of conviction or acquittal thereof for protection against a further prosecution for the same cause.

VIII. That said indictment does not inform defendant of the nature or cause of the accusation or the attempted accusation against him and was presented, issued and found, and is in violation of and contrary to the provisions of Article VI of the amendments to the Constitution of the United States of America and of the right of defendant, guaranteed by said constitutional provisions, to be informed of the nature and cause of the accusation." (R. 4-6.)

The demurrer interposed by the defendant was overruled, to which order the defendant entered an exception. (R. 6)

The defendant then interposed a motion for a bill of particulars, requiring the Government to specify and state at what time and times, from what person or persons, at what place or places and under what circumstances the defendant *received* or *concealed* or *bought* or *sold* or *transported* or *facilitated* the transportation of the various tins of opium described in the various overt acts contained in the indictment. This motion was made upon the ground that the indictment in respect to the charge of conspiracy or of overt acts is so vague, indefinite and uncertain as to fail to inform the defendant of the nature or cause of the accusations against him or to enable him to avail himself of conviction or acquittal therefor, for protection against a further prosecution for the same cause, and that unless the particulars desired are furnished the defendant would be deprived of his constitutional rights guaranteed by the provisions of article VI of the amendments to the Constitution of the United States of America.

Further, that the delivery to the defendant of the said particulars was indispensable to enable him to prepare for a trial of said cause and was necessary to a full and

fair trial of said cause and that the averments of the indictment are in such general and ambiguous terms as to wholly fail to state the commission of an overt act as required by the statute. (R. 7-9.)

The application for a bill of particulars was denied and to this ruling the defendant noted an exception. (R. 9-10-18.)

The statement of the plan, purpose and object of the alleged conspiracy, namely,

> "to wilfully, knowingly, unlawfully and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale, after importation, of certain narcotic drugs, to-wit, smoking opium, the said defendant knowing the said opium to have been imported into the United States and into the jurisdiction of this Court contrary to law,"

is too vague and indefinite and uncertain and lacks that certainty and precision of designation requisite to inform the defendant of the exact charge and to enable him to prepare his defense to meet it.

The indictment fails, also, to contain a statement of the facts relied upon as constituting the offense in ordinary and concise language and with as much certainty as the nature of the case admits of and in such a manner as to enable a person of common understanding to know what is intended and with such precision of fact that the defendant could plead his acquittal or conviction as a bar of a later prosecution for the same offense.

In the assignment of errors the defendant assigned as error the order of the Court overruling his amended demurrer to the indictment (R. 56), and also assigned as an error the order of the Court denying his motion for a bill of particulars (R. 56).

Subdivision (c) of section 1 of the Act of May 26, 1922, reads as follows:

> "That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years."

The Sixth Amendment to the Constitution of the United States reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation. * * *"

The Fifth Amendment to the Constitution of the United States provides in part:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. * * *"

Subdivision (c) of section 1 of the Act of May 26, 1922, condemns as separate and distinct crimes a great number of different acts. Thus, the *receiving* of narcotic drugs known to have been imported contrary to law is

a crime. The *concealment* of narcotic drugs known to have been imported contrary to law is a crime. The *purchase* of narcotic drugs known to have been imported contrary to law is a crime. The *sale* of narcotic drugs known to have been imported contrary to law is a crime. To in any manner *facilitate the transportation* of narcotic drugs known to have been imported contrary to law is a crime. To in any manner *facilitate the concealment* of narcotic drugs known to have been imported contrary to law is a crime. To in any manner *facilitate the sale* of narcotic drugs known to have been imported contrary to law is a crime. These are separate crimes denounced by the act and in no way are concomitant parts of a single offense.

This right assured a person charged with crime, of being informed of the nature and cause of the accusation, is guaranteed by the Sixth Amendment to the United States Constitution and is not to be lightly set aside or ignored by public prosecutors.

> "The constitutional right of the accused to demand the nature and cause of his accusation is not a technical right, but is fundamental and essential to the guaranty that no person shall be deprived of his liberty, except by due process of law, nor be twice put in jeopardy for the same offense."
>
> *Cooper* v. *State,* 15 Ala. A. 657.

> "There is no policy in encouraging carelessness or laxity in criminal pleadings. When any departure from the required form is tolerated, it, instead of being regarded as a beacon to warn the pleader of danger, is instantly seized upon as a precedent and urged as a reason why there should be a greater relaxation of the rule requiring the

observance of forms. In this way the courts will be led step by step to the subversion of all order in the administration of the Criminal Code. When a man is called upon to defend himself against the charge of having violated the law, it is not unreasonable that he should require the accusation against him to be in sensible language."

State v. *Mitchell,* 25 Mo. 420.

The Supreme Court of the United States has repeatedly expressed itself in the strongest possible language on the necessity of protecting the right of defendants to be informed of the charge against them. In *United States* v. *Cruikshank,* 92 U. S. 557, the court said:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' (Amend. VI.) In *United States* v. *Mills,* 7 Pet. 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in *United States* v. *Cook,* 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.' (1 Arch. Cr. Pr. and Pl. 291.) The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide

whether they are sufficient in law to support a conviction, if one should be had. A crime is made up of act and intent, and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

And in the case of *United States* v. *Hess,* 124 U. S. 486, Justice Field said:

> "The general and with few exceptions, of which the present is not one, the universal rule on this subject is, that all the material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication and the charge must be made directly and not inferentially or by way of recital * * *
>
> "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied by such a statement of the facts and circumstances as will inform the accused of the specific offense coming under the general description, with which he is charged."

And in *Bartell* v. *U. S.,* 227 U. S. 430, the court said:

> "It is elementary that an indictment, in order to be good under the Federal Constitution and laws, shall advise the accused of the nature and cause of the accusation against him, in order that he may meet the accusation, and prepare for his trial, and that after judgment, he may be able to plead the record and judgment in bar of a further prosecution for the same offense."

In *United States* v. *Simmons,* 96 U. S. 360, Mr. Justice Harlan uses this language:

> "Where the offense is purely statutory, having no relation to the common law, it is as a general rule sufficient in the indictment to charge the defendant

with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter. (1 Bishop Crim. Proc., sec. 611, and authorities there cited.) But to this general rule there is the qualification, fundamental in the law of criminal proceeding, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

See also

U. S. v. *Carll*, 105 U. S. 611;
Peters v. *U. S.*, 94 Fed. 127;
Foster v. *U. S.*, 253 Fed. 482;
Johnson v. *U. S.*, 294 Fed. 753.

In the case of *Foster* v. *U. S.*, 253 Fed. 482, the court said:

"A statutory offense may be so defined that the indictment will sufficiently charge the violation of it if it follows the language of the statute, but this is so only in cases where the statute apprises the offender from the mere adoption of the statutory terms of the precise nature of the offense for which he is to be tried. Here the statute is very general in its terms and the indictment merely charges in the language of the statute."

In *U. S.* v. *Burns*, 54 Fed. 359, the court said:

"The government does not wish their conviction unless they be guilty, and it should not be permitted to demand their conviction until it has given them a full and fair opportunity to make their defense to a plain and positive charge." * * *

"The accumulated wisdom of the past, of years of judicial investigation, has established these rules.

> They are necessary not to aid the guilty, but to protect the innocent. As has been well said: Precision in the description of the offense is of the last importance to the innocent, for it is that which marks the limits of the accusation, and fixes the proof of it. Judge Story, in his Commentaries on the Constitution of the United States (vol. 2, sec. 1785) on this subject says:
>
> "'The indictment must charge the time and place and nature and circumstances of the offense with clearness and certainty, so that the party may have full notice of the charge, and be able to make his defense with all reasonable knowledge and ability.'"

Not only was defendant's amended demurrer overruled, but his subsequent motion for a bill of particulars was likewise denied, as was also the motion in arrest of judgment (R. 6, 9-10, 52).

It must be evident to this Honorable Court that the defendant's rights, guaranteed to him by Amendment VI of the Constitution of the United States, were denied to him. He was left in complete ignorance as to the material and essential facts which the prosecution claimed constituted the conspiracy to violate the Jones-Miller Act of May 26, 1922. He was left completely in the dark as to what he would have to meet; what facts, what places, what dates, what witnesses, what opium. He was not apprised of the facts upon which the prosecutor based its claim that the defendant had committed any offense. It must be remembered that the defendant was accused of a statutory, not a common law, offense. He was left in the dark, in fact was refused the right to know, whether he was being or would be prosecuted for a conspiracy to *receive,* or a conspiracy to *conceal,* or a conspiracy to *buy,* or a conspiracy to *sell,* or a con-

spiracy *to facilitate the transportation* or *concealment* after importation of smoking opium. He was unable, and was deprived of a reasonable opportunity, to defend himself, not knowing the circumstances and facts surrounding the case of the alleged offense, so that he could verify or identify such facts, procure witnesses and make defense. He was unable, with such meager accusations standing against him, to procure and present evidence in his defense. In other words, he was completely at the mercy of his prosecutor—*the very thing that the solemn and sacred guarantees of the Sixth Amendment were intended to prevent and to protect one from, when accused of crime.*

It is respectfully submitted that the trial court erred, first, in overruling defendant's amended demurrer; second, in denying the motion for a bill of particulars; and, third, in denying the motion in arrest of judgment.

III.

Erroneous Instruction to the Jury as Set Out in Assignment of Error No. 1 (R. 55; Assignment of Error No. 1).

The instruction and views advanced by the learned trial Judge were, we respectfully submit, erroneous. To instruct the jury that:

> "*We know* it (opium) is not made here in this country, so any man who finds smoking opium in this country is bound to know and does know that it has been unlawfully imported; and then if he takes part in concealing it and transporting it or receiving it and covering it up from the government, then he is knowingly doing those things that the law forbids" (R. 52, 55),

is totally inconsistent both with the law and the facts. It is utterly at variance with the legislation of Congress on the subject of domestic opium, as contained in the Act of January 17, 1914, c. 10, 38 Stats. 277, levying and collecting a tax of $300.00 per pound on opium manufactured for smoking, and permitting the manufacture of said smoking opium under bond of $100,000.00 or more by citizens in the United States, and to the provision, Section 1 of the Harrison Anti-Narcotic Act, referring to the production in the United States of opium. Such instruction is totally inconsistent with the views expressed by this Honorable Court in the case of *United States* v. *Jin Fuey Moy,* 241 U. S. 394, where the court says:

> "If we could know judicially that no opium is produced in the United States the difficulties in this case would be less, but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. Section 1. (Harrison Anti-Narcotic Act.) Congress, at all events, contemplated production in the United States and therefore the act *must be construed* on the hypothesis that it takes place.
>
> *"If opium is produced in any of the States, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime.* (*United States* v. *DeWitt,* 9 Wall. 41.)"

The element of knowledge of the unlawful importation is a most material ingredient of the offense charged under the Jones-Miller Act, for conspiring to violate which the defendant was convicted. That material element of knowledge of the unlawful importation had to be specifically alleged and proved to sustain a conviction both for conspiring to violate the Jones-Miller Act

and for the commission of the substantive offense itself. For the trial judge to instruct the jury that: *"We know* it (opium) is not made here," etc., was not only, in effect, instructing the jury to convict the defendant, but was at variance with the Congressional laws, the views and utterances of this Supreme Court itself, and with the actual conditions and facts relating to the production and manufacture of domestic opium and narcotics, which are a matter of common knowledge.

It is respectfully submitted that the trial judge erred in instructing the jury as above stated.

Upon all of the grounds heretofore urged, we earnestly contend that the judgment of conviction should be reversed.

Respectfully submitted,

MARSHALL B. WOODWORTH,
Attorney for Plaintiff in Error.

FRANK J. HENNESSY,
Of Counsel.

San Francisco, California, October 25, 1926.

INDEX

AUTHORITIES CITED

Statutes: Page

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 79

WONG TAI, ALIAS WONG SUE JUN, ALIAS WONG WAI,
PLAINTIFF IN ERROR

v.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

This is a criminal case coming directly from the trial court, and no opinion was rendered therein.

JURISDICTION OF THIS COURT

The judgment of conviction sought to be reviewed was entered on February 26, 1925. (R. 12.)

The petition for writ of error was filed February 28, 1925. (R. 53.) The jurisdiction of this Court is invoked under Section 238 of the Judicial Code

as amended by the Act of January 28, 1915 (c. 22, 38 Stat. 803, 804), on the ground that constitutional questions are involved. One question raised first in this Court in the assignments of error (R. 55) is that the Act of February 9, 1909, and its amendments regulating importation of opium is unconstitutional. That point was not raised below and forms no basis for the jurisdiction of this Court. In addition, it is frivolous.

The other constitutional question, which was properly raised in the trial court by demurrer (R. 4–6) and motion in arrest (R. 52) and decided against the plaintiff in error (R. 15, 52), is that the indictment did not inform defendant of the nature or cause of the accusation, as required by the Sixth Amendment. This point is without substance. Both are discussed later in this brief.

STATEMENT

Plaintiff in error was convicted in the United States District Court for the Northern District of California under an indictment charging him and others with conspiring to violate the Act of February 9, 1909 (c. 100, 35 Stat. 614), as amended by the Acts of January 17, 1914 (c. 9, 38 Stat. 275), and May 26, 1922 (c. 202, 42 Stat. 596). The indictment charges plaintiff in error and his codefendants with conspiring to "receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain narcotic drugs, to wit,

smoking opium," well knowing the said drugs to have been unlawfully imported. (R. 2.)

By demurrer and motion in arrest of judgment, plaintiff in error attacked the sufficiency of the indictment, alleging that it did not sufficiently apprise him of "the nature or the cause of the accusation" against him, thus seeking to raise a constitutional question. The demurrer and motion in arrest were overruled. (R. 6 and 52.)

The plaintiff in error also filed a motion for a bill of particulars, which was denied. (R. 7–9.)

APPLICABLE STATUTES

Section 37 of the Criminal Code of the United States reads as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

The Act of January 17, 1914 (c. 9, 38 Stat. 275), amended the entire Act of February 9, 1909 (c. 100, 35 Stat. 614). The Act of May 26, 1922 (c. 202, 42 Stat. 596), amended all but Sections 3, 4, and 7 of the Act of February 9, 1909, as amended.

Paragraphs "a," "b," "c," and "f" of Section 2 of the Act of February 9, 1909, as amended by Section 1 of the Act of May 26, 1922, read as follows:

(a) That there is hereby established a board to be known as the "Federal Narcotics Control Board" and to be composed of the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce Except as otherwise provided in this Act or by other law, the administration of this Act is vested in the Department of the Treasury.

(b) That it is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

(c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years.

> (f) Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury.

Section 3 of the Act of February 9, 1909, as amended by the Act of January 17, 1914, reads as follows:

> That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption.

CONTENTIONS OF THE PLAINTIFF IN ERROR

Plaintiff in error in his brief urges three grounds for reversal of the judgment below:

I. That the Act of February 9, 1909, as amended by the Act of May 26, 1922, is unconstitutional.

II. That the indictment did not inform him of the nature and cause of the accusation, as required by the Sixth Amendment, and the trial court erred in overruling his demurrer and denying his motion for a bill of particulars.

III. That the trial court erred in instructing the jury that "any man who finds smoking opium in this country is bound to know and does know that it has been unlawfully imported."

SUMMARY OF ARGUMENT

I. The record fails to show that plaintiff in error raised in the trial court any question regarding the constitutionality of the Act of February 9, 1909, as amended by the Act of May 26, 1922. Therefore no such question can now be utilized to support the jurisdiction of this Court. If any such question were open, the Act of February 9, 1909, is valid. This Court long ago held that Congress has authority to prohibit absolutely the importation of opium. Cases dealing with the Harrison Narcotic Act have no bearing upon the constitutionality of the Act of February 9, 1909, as amended, as the latter is based on the power to regulate commerce. The provision of the Act of February 9, 1909, as amended, permitting the importation of such amounts of opium as the Federal Narcotics Control Board finds necessary for medical and legitimate uses is not a delegation of legislative power. There is no conflict between the Act under which the case at bar arises, dealing with importing narcotic drugs, and the Act of January 17, 1914 (c. 10, 38 Stat. 277), dealing with the manufacture of smoking opium in this country, and if there were such conflict plaintiff in error could derive no advantage therefrom because he is asserting no rights under the Act of 1914.

II. The indictment fairly meets the constitutional requirements. It plainly sets forth all the statutory ingredients of the offense charged and it does not appear that the alleged lack of allega-

tions of detailed facts therein in any way prejudiced the plaintiff in error.

III. The presumption created by the statute, arising from unexplained possession of opium, was held valid in *Yee Hem* v. *United States,* 268 U. S. 178, and in the absence of any attempt on the part of plaintiff in error to show that he was lawfully in possession of opium, the instruction of the trial court that "any man who finds smoking opium in this country is bound to know and does know that it has been unlawfully imported" was in substance a statement of the statutory presumption.

ARGUMENT

I

NO QUESTION AS TO THE CONSTITUTIONALITY OF THE ACT OF FEBRUARY 9, 1909, AS AMENDED, IS OPEN ON THE RECORD NOW BEFORE THIS COURT, BUT IF ANY SUCH QUESTION WERE OPEN THE ACT AS AMENDED IS VALID

The record fails to show that plaintiff in error raised at the trial any question regarding the constitutionality of the Act of February 9, 1909, as amended by the Act of May 26, 1922, *supra.* The point is first mentioned in the assignments of error in this Court. It is therefore apparent that no such question can now be utilized to support the jurisdiction of this Court under Section 238 of the Judicial Code as amended, *supra.*

Itow and Fushimi v. *United States*, 233 U. S. 581, 584.

Ansbro v. *United States*, 159 U. S. 695, 697.

But if plaintiff in error had raised below any question as to the constitutionality of the Act as amended, it is without substance. *Yee Hem* v. *United States*, 268 U. S. 178.

The plaintiff in error seeks to distinguish the *Yee Hem case* on the ground that it was decided before the amendment of May 26, 1922. But most of the objections to the Act now urged by the plaintiff in error were considered and disposed of by this Court in the *Yee Hem case*, and the principles established by that case are as applicable since the amendment of May 26, 1922, as they were before.

In the *Yee Hem case* this Court said (268 U. S. 178, 183):

> The authority of Congress to prohibit the importation of opium in any form and, as a measure reasonably calculated to aid in the enforcement of the prohibition, to make its concealment with knowledge of its unlawful importation a criminal offense, is not open to doubt. *Brolan* v. *United States*, 236 U. S. 216; *Steinfeldt* v. *United States*, 219 Fed. 879. * * *

The cases cited in the brief of the plaintiff in error, dealing with the Harrison Narcotic Act (Act of December 17, 1914, c. 1, 38 Stat. 785, as amended by the Act of February 24, 1919, c. 18, 40 Stat. 1057, 1130) have no bearing upon the constitutionality of

the Act of February 9, 1909, as amended. The latter Act is based on the commerce power.

Plaintiff in error further contends that the Act of February 9, 1909, as amended by the Act of May 26, 1922, is unconstitutional because the amendment created the Federal Narcotics Control Board and permitted the importation of "such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only." The argument is that this is a delegation of legislative power. This argument does not merit discussion. It has long been settled by this Court that while the legislature can not delegate its power to make a law, it may make a law which delegates to an administrative officer or body power to determine some fact or state of facts upon which the action of the law depends. *Field* v. *Clark*, 143 U. S. 649, 694; *United States* v. *Grimaud*, 220 U. S. 506; *McKinley* v. *United States*, 249 U. S. 397.

Nor is there any conflict between the Act of 1922, under which the case at bar arises, and the Act of January 17, 1914 (c. 10, 38 Stat. 277). The former Act deals with importing narcotic drugs, while the latter Act deals solely with the manufacture of smoking opium in this country. In no event could plaintiff in error, on the record before this Court, derive any advantage from possible conflict, for he is asserting no right under the Act of 1914. Moreover, if conflict existed, the later Act would prevail.

II

THE INDICTMENT FAIRLY MEETS THE CONSTITUTIONAL REQUIREMENTS

By his fourth assignment of error plaintiff in error alleges that the indictment does not inform him "of the nature or cause of the accusation," and therefore does not fulfill the requirements of the Constitution in this regard. His complaint appears to rest upon the claim that the indictment, which was one for conspiracy, should have descended into greater detail in describing the scope of the conspiracy and the overt acts committed thereunder.

It seems proper to set forth at this point the charging part of the indictment and a sample overt act (R. 2):

> The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present that Wong Tai, alias Wong Sue Jun, alias Wong Wai, hereinafter called the defendant, heretofore, to wit, on or about September 10, 1922, the exact date being to the Grand Jurors, aforesaid unknown, at the City and County of San Francisco, in the Southern Division of the Northern District of California, then and there being, did then and there unlawfully, wilfully, knowingly and feloniously conspire, combine, confederate and agree with one Ben Drew and with divers other persons to the Grand Jurors unknown, to commit the acts made crimes

and offenses by the laws of the United States, to wit, The Act of February 9, 1909, as amended January 17, 1914, and as amended May 26, 1922, that is to say; the said defendant did, at the time and place aforesaid, knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree with one Ben Drew and with divers other persons to the Grand Jurors, aforesaid, unknown, to unlawfully, wilfully, knowingly and feloniously receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain narcotic drugs, to wit, smoking opium, the said defendant well knowing the said drugs to have been imported into the United States and into the jurisdiction of this Court contrary to law.

That said conspiracy, combination, confederation and agreement between the said defendant and the said Ben Drew and the said divers other persons whose names are as aforesaid to the Grand Jurors unknown, was continuously throughout all the times from and after the month of September, 1922, and at all the times in this indictment mentioned and referred to and particularly at the time of the commission of each of the overt acts in this indictment hereinafter set forth, in existence and process of execution.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect

> and accomplish the object thereof, the said defendant did at the City and County of San Francisco and within the jurisdiction of this Court, receive, conceal, buy, sell and facilitate the transportation after importation of certain narcotic drugs, to wit, three small sacks containing a number of tins of opium, the exact number of tins of opium contained in said sacks being to the Grand Jurors, aforesaid, unknown, which arrived on the Steamer *President Pierce* on or about February 24, 1923, and without the knowledge and consent of the custom officers of the United States and more particularly the custom officers in charge of the Port at San Francisco, aforesaid.

In refusing a bill of particulars the trial court said (R. 9):

> Denied. The indictment seems sufficiently definite in view of unknown involved—and defendant moves for too much details of evidence.

From the very nature of the scheme employed by plaintiff in error, viz, to secure the secret bringing to this country of opium aboard vessels, its discharge in the night time through the port holes of said vessels into the water, and its subsequent recovery, landing, and distribution by him, obviously the Government could not possibly learn all the details regarding said opium and its handling. (R. 21 et seq.)

The indictment plainly sets forth all the statutory ingredients of the offense, so that the alleged lack of allegations of detailed facts therein can not be said to constitute such a fundamental defect as to require reversal.

This is a conspiracy indictment, and is plainly adequate under the rules of pleading applied to such indictments in *Thornton* v. *United States,* decided by this Court June 1, 1926, under No. 255 (not yet reported), and *Dealy* v. *United States,* 152 U. S. 539, 543 et seq.

Nor does the record disclose that the alleged defect in the indictment in anywise prejudiced the plaintiff in error in the preparation and submission of his defense. (R. 41 et seq.)

The following excerpt from *Lamar* v. *United States,* 241 U. S. 103, 116, wherein the sufficiency of the indictment was dealt with, equally applies to the record in the case at bar:

> * * * It is moreover to be observed that there is not the slightest suggestion that there was a want of knowledge of the crime which was charged or of any surprise concerning the same, * * *.

In *Connors* v. *United States,* 158 U. S. 408, 411, this Court, in dealing with an attack upon the indictment, said, among other things:

> * * * There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he

was in doubt as to what was the precise offence with which he was charged.

The rule to be applied in cases involving attacks upon the sufficiency of the indictment, as in the case at bar, was concisely stated in *Armour Packing Co.* v. *United States,* 209 U. S. 56, 84, as follows:

> And in *Ledbetter* v. *United States,* 170 U. S. 606, 612, Mr. Justice Brown, speaking for the court, said:
>
> "Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense."
>
> In the present case no objection was made to the indictment until after verdict by motion in arrest of judgment.
>
> Had it been made by demurrer or motion and overruled it would not avail the defendant, in error proceedings, unless it appeared that the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the particular mode in which the offense charged was committed. See Rev. Stat. U. S. § 1025; *Connors* v. *United States,* 158 U. S. 408, 411.

Whether a motion for a bill of particulars should be granted is to be determined in the exercise of a sound judicial discretion, which discretion is not reviewable except perhaps in a case exhibiting

manifest abuse. *Dunlop* v. *United States,* 165 U. S. 486, 491, and *Savage* v. *United States,* 270 Fed. 14, 18; certiorari denied, 257 U. S. 642.

An examination of the motion for a bill of particulars which appears at pages 7–9 of the record, indicates that the purpose of the motion was really to learn what evidence the Government possessed. Obviously, all the detailed facts sought by the motion were not necessary to enable plaintiff in error to understand the charge set forth in the indictment, and properly prepare his defense. Certainly it cannot be demonstrated that there was an abuse of discretion in the overruling of the motion.

From the foregoing the conclusion seems inevitable that (1) the record makes it plain that plaintiff in error fully understood the charge alleged against him in the indictment; (2) there is no defect of a fundamental character in the indictment; and (3) the constitutional question bedded on the alleged defect is lacking in substance.

III

NO QUESTION AS TO THE INSTRUCTION OF THE TRIAL COURT THAT "ANY MAN WHO FINDS SMOKING OPIUM IN THIS COUNTRY IS BOUND TO KNOW AND DOES KNOW THAT IT HAS BEEN UNLAWFULLY IMPORTED" IS OPEN IN THE RECORD NOW BEFORE THIS COURT, AND IN ANY EVENT THE INSTRUCTION WAS PROPER

The plaintiff in error complains of the following instruction given by the trial court (R. 52):

> The law forbids that kind of opium to come into the country at all. We know it is not made here in this country, so any man who finds smoking opium in this country is bound to know and does know that it has been unlawfully imported; and then if he takes part in concealing it and transporting it, or receiving it and covering it up from the Government, then he is knowingly doing those things that the law forbids.

In his assignments of error plaintiff in error alleges that this instruction was not a correct statement of the law and that the provisions of the Act of February 9, 1909, as amended, in respect of the presumption arising from the unexplained possession of opium are unconstitutional and void. (R. 55.) The record fails to show that plaintiff in error raised any such question at the trial.

In addition, the instruction seems entirely proper. In the absence of any attempt on the part of plaintiff in error to show that he was lawfully in possession of opium, the instruction was in substance a statement of the presumption created by the statute. *Yee Hem* v. *United States,* 268 U. S. 178, specifically held that this presumption is valid.

CONCLUSION

The writ of error should be transferred to the Circuit Court of Appeals for the Ninth Circuit because no substantial constitutional question is involved, or, in the alternative, the judgment below should be affirmed. It is unfortunate that the de-

fects in jurisdiction were not noticed earlier, so as to prevent delay in the final disposition of this case.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HARRY S. RIDGELY,
Attorney.

GARDNER P. LLOYD,
Special Assistant to the Attorney General.

NOVEMBER, 1926.

○

SUPREME COURT OF THE UNITED STATES.

No. 79.—October Term, 1926.

Wong Tai, alias Wong Sue Jun, alias Wong Wai, Plaintiff in Error, *vs.* The United States of America.	In Error to the District Court of the United States for the Northern District of California.

[January 3, 1927.]

Mr. Justice Sanford delivered the opinion of the Court.

The plaintiff in error was indicted in the Federal District Court for Northern California under § 37 of the Criminal Code,[1] for conspiring to commit offenses against the United States in violation of the Opium Act of 1909, as amended in 1914 and 1922.[2] He was tried and convicted; and thereupon brought the case here by a direct writ of error under § 238 of the Judicial Code, before the amendment made by the Jurisdictional Act of 1925 became effective, as one involving the application of the Constitution and in which the constitutionality of a law of the United States was drawn in question.

The errors assigned and specified here are that the Opium Act, as amended, is repugnant to the due process and self-incrimination clauses of the Fifth Amendment; that the indictment is invalid under the Sixth Amendment; and that the court erred in overruling a demurrer to the indictment, denying a motion for a bill of particulars and a motion in arrest of judgment, and in its charge to the jury.

1. There was no challenge to the constitutionality of the Opium Act in the District Court. This question was not presented in that

[1]This section provides that: "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy" shall be fined, or imprisoned, or both.

[2]Act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the Acts of January 17, 1914, c. 9, 38 Stat. 275, and May 26, 1922, c. 202, 42 Stat. 596.

court and was neither considered nor determined by it. The objections to the constitutionality of the Act which were set out in the assignment of errors are fully answered in *Yee Hem* v. *United States,* 268 U. S. 178, decided after this writ of error had been sued out; and the additional objections set forth for the first time in the brief for the defendant in this Court, do not require consideration here.

2. The case is, however, otherwise brought here under the writ of error, by reason of a challenge which the defendant interposed to the validity of the indictment on the ground that it did not inform him of the "nature and cause of the accusation" as required by the Sixth Amendment.

The Opium Act, as amended, provides, in § 2(c), that if any person " receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale" of any narcotic drug "after being imported" into the United States, "knowing the same to have been imported contrary to law," he shall upon conviction be fined or imprisoned. 42 Stat. 596.

The indictment, which was returned in September, 1924, charged that on or about September 10, 1922, the exact date being to the grand jurors unknown, the defendant, being in the City and County of San Francisco, within the jurisdiction of the court, conspired to commit the acts made offenses by the Opium Act, as amended, that is to say, that at the time and place aforesaid, he knowingly and feloniously conspired and agreed with one Ben Drew and divers other persons to the grand jurors unknown, to "knowingly and feloniously receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain narcotic drugs, to-wit, smoking opium, the said defendant well knowing the said drugs to have been imported into the United States and into the jurisdiction of this Court contrary to law"; that this conspiracy continued throughout all the times after September, 1922, mentioned in the indictment and particularly at the time of the commission of each of the overt acts thereinafter set forth; and that in furtherance of this conspiracy and to effect its object, the defendant, in the City and County of San Francisco received, bought, sold and facilitated the transportation after importation of three small sacks containing tins of opium which arrived on the Steamer President Pierce on or about February 24, 1923, without the knowledge and consent of the customs officers in charge

of the port at San Francisco, and also, to effect the same object, and in the same place, received, bought, etc., after importation other sacks containing tins of opium, which likewise arrived without the knowledge and consent of said customs officers, namely, five sacks which arrived on the Steamer Nanking on or about May 10. 1923, three sacks which arrived on the Steamer President Wilson on or about May 25, 1923, five sacks which arrived on the Steamer Taiyo Maru on or about May 27, 1923, five sacks which arrived on the Steamer President Taft on or about June 29, 1923, two sacks which arrived on the Steamer President Lincoln, on or about August 19, 1923, and one sack which arrived on the Steamer President Cleveland on or about February 3, 1924, the exact number of tins of opium in these several sacks and the exact dates of their arrival being unknown to the grand jurors.

The defendant demurred to the indictment on the ground that its allegations as to the conspiracy and overt acts were so vague, indefinite and uncertain that they did not inform him of the nature and cause of the accusation as required by the Sixth Amendment, and enable him to make proper defense or plead his jeopardy in bar of a later prosecution for the same offense. This demurrer and a subsequent motion made in arrest of judgment on the same grounds, were both overruled by the District Court.

While it is essential to the validity of an indictment under the Federal Constitution and laws that it shall advise the defendant of the nature and cause of the accusation in order that he may meet it and prepare for trial and, after judgment, be able to plead the record and judgment in bar of a further prosecution for the same offense, *Bartell* v. *United States*, 227 U. S. 427, 431, we find in the present indictment no lack of compliance with this requirement. It charged the defendant, with definiteness and certainty and reasonable particularity as to time and place, with conspiring with a named person and others to commit certain specified offenses in violation of the Opium Act; and further charged him, in like manner, with doing various specified acts to effect the object of the conspiracy. It is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, *Williamson* v. *United States*, 207 U. S. 425, 447, or to state such object with the detail which would be re-

quired in an indictment for committing the substantive offense, *Thornton* v. *United States*, 271 U. S. 414, 423; *Jelke* v. *United States* (C. C. A.), 255 Fed. 264, 275; *Anderson* v. *United States* (C. C. A.), 260 Fed. 557, 558; *Wolf* v. *United States* (C. C. A.), 283 Fed. 885, 886; *Goldberg* v. *United States* (C. C. A.), 277 Fed. 211, 213. In charging such a conspiracy "certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary." *Williamson* v. *United States, supra*, 447; *Goldberg* v. *United States, supra*, 213. That this requirement was complied with in the present indictment is clear. In *Keck* v. *United States*, 172 U. S. 434, upon which the defendant relies, the indictment was not, as here, for conspiring to commit offenses, but for committing the substantive offenses. And in *Hartson* v. *United States* (C. C. A.), 14 F. (2d) 561, upon which he also relies, a count charging a single conspiracy to commit several offenses, was held sufficient, although another count charging in like manner the commission of one of these substantive offenses, was held insufficient. In the present case we think that the allegations of the indictment, both in respect to the conspiracy and the overt acts, sufficiently advised the defendant of the nature and cause of the accusation, and with the requisite particularity. We conclude that there was no invalidity in the indictment under the Sixth Amendment, and that both the demurrer and the motion in arrest of judgment were properly overruled.

3. The defendant also made a motion, supported by affidavit, for a detailed bill of particulars, setting forth with particularity the specific facts in reference to the several overt acts alleged in the indictment, with various specifications as to times, places, names of persons, quantities, prices, containers, buildings, agencies, instrumentalities, etc., and the manner in which and the specific circumstances under which they were committed. This motion—which in effect sought a complete discovery of the Government's case in reference to the overt acts—was denied on the ground that the indictment was sufficiently definite in view of the unknown matters involved and the motion called "for too much details of evidence."

The application for the bill of particulars was one addressed to the sound discretion of the court, and, there being no abuse of this discretion, its action thereon should not be disturbed. See *Rosen* v. *United States*, 161 U. S. 29, 40; *Dunlop* v. *United States*, 165 U. S. 486, 491; *Knauer* v. *United States* (C. C. A.), 237 Fed. 8, 13;

Horowitz v. *United States* (C. C. A.), 262 Fed. 48, 49; *Savage* v. *United States* (C. C. A.), 270 Fed. 14, 18. And there is nothing in the record indicating that the defendant was taken by surprise in the progress of the trial, or that his substantial rights were prejudiced in any way by the refusal to require the bill of particulars. See *Connors* v. *United States*, 158 U. S. 408, 411; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 84; *New York Central R. R.* v. *United States*, 212 U. S. 481, 497.

4. Error is also assigned as to a statement made in the charge to the jury in respect to the defendant's knowledge that certain opium had been unlawfully imported; but it suffices to say that this was not excepted to.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.